Task Force on Labour Relations

Study No. 8

Labour Disputes in Essential Industries

by Harry W. Arthurs
LL.B. (Toronto), LL.M. (Harvard)
Osgoode Hall Law School
York University

Privy Council Office
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(under the Privy Council Office)

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PREFACE

This study was undertaken during the spring and summer of 1967 at the request of the Prime Minister's Task Force on Labour Relations. Research was completed by September 1967 and a first draft was submitted to the Task Force in April 1968. During the summer of 1968, an editorial revision was undertaken in order to produce a final draft. However, no further research was pursued except for three matters: an analysis of experience under the Ontario Hospital Labour Disputes Arbitration Act from July 1, 1967 to July 1, 1968; a description of the British Columbia Mediation Commission Act of 1968; and an up-dating of 1967 statistics. The account of the law and actual experience with essential industry disputes in Canada and abroad must therefore generally be taken to describe matters as of September 1967.

One further prefatory explanation is in order. This study was only one of a number commissioned by the Task Force in the general area of essential industry disputes. Particular mention should be made of the studies by Professor Pierre Verge on the definition of essential industries, by Mr. Paul Malles on various problems of European labour systems, and of several studies covering railways, hospitals, public service, and other industries which might reasonably be termed "essential". The dimensions of this study,

naturally, were tailored to reflect the other material which was available to the Task Force.

I wish to acknowledge the invaluable assistance of Messrs. Colin Coolican, Tom Lockwood, and Brian Bucknall, who at various times contributed greatly to the research reflected in this study. For typing this lengthy manuscript in its various drafts, I am indebted to Mesdames Jill Vickers, Margaret Murray, and Constance Johnston. My wife Sheila patiently helped me agonize through endless discussions and doubts and her comments and questions are reflected throughout the study.

September 1, 1968.

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CHAPTER I

DEFINING ESSENTIAL INDUSTRIES

Definition is a purposeful exercise. Apart from the intrinsic intellectual fascination of the question "what is an essential industry?", it is because we propose to handle labour disputes in those industries in a special way that the question becomes important. To the extent that dispute settlement techniques in essential industries depart radically from those employed in other industries, the definitional problem is heightened. Moreover, to the extent that this special treatment involves elements of compulsion which are out of the mainstream of a labour relations tradition of voluntarism, still greater care must be taken.

It must not be thought that essentiality is a self-defining concept. While there is likely broad consensus about the need to safeguard interests such as personal health, safety, and security, and probably the physical integrity of private property as well, there is serious controversy over the protection of other economic and social interests. For example, the continued functioning of news media, basic industries such as steel, and the maintenance of transportation facilities, all cut close to the core of the community's economic life and affect important social interests as well, yet many would disagree with the suggestion that any of these situations are "essential" in the sense that they warrant departure from traditional labour relations policies. Even given a consensus about the essentiality of an industry, there will be real and honest differences of opinion on the facts of any particular case about the impact of a labour dispute. Frequently these differences will be the product of ignorance: the prediction of harm to the public or to individual members of it will have to be made without

the benefit of precedent, without full knowledge of the degree to which service or supply can be maintained during the labour dispute, without knowledge of the availability of substitute services or goods, and without any sure guide to the resiliency of those who are deprived of what is said to be "essential". All of these difficulties are intensified if the definition is cast in general terms and conceived in isolation from particular situations. Yet this is the style familiar to legislative draughtsmen who must construct a statutory mechanism upon certain premises about the nature of the dispute which it is designed to confine.

Unfortunately, without definition, analysis is almost impossible. For the purpose of reviewing our experience to date with "emergency" disputes and analyzing proposals for their avoidance and settlement, it is therefore necessary to adopt at least one, if not several, working definitions. Three broad possibilities suggest themselves: (a) definition by precedent, (b) a conceptual definition, and (c) a phenomenological definition.

A. Definition by Precedent

Perhaps the most convenient guide to what is an "essential" industry is the fact that legislators or high officers of government have found it necessary or advisable to suspend or alter normal labour relations procedures in certain industries. While a more detailed examination of legislative and executive action will be undertaken below, a tentative list of these industries includes transportation, public utilities, hospitals, public service, teachers, policemen, and firemen. This is not to say that the particular solutions adopted by any given legislature were necessarily sound. Rather, the list simply is intended to identify the apparently widespread belief, in a number of Canadian jurisdictions, that special concern must be taken to avoid interruption of service in these situations.

By way of caution, it must also be added that legislative and executive action has not always been based upon an objective assessment of the impact of a labour dispute upon the community. All too often, it is based upon snap judgments made under great political pressure in the midst of a crisis.

B. A Conceptual Definition

Our basic public policy of resolving labour disputes through collective bargaining emphasizes the private nature of the dispute. The parties, it is assumed, are best able to judge for themselves the means of settlement—whether peaceful or otherwise—and the terms of settlement. The use of the term "essential" industry is obviously intended to signal the presence of an inordinately high public interest, certainly in the mode of settlement, and perhaps in its terms as well. However, ordinary disputes and emergency disputes do not comprise mutually exclusive categories, in the former of which the public interest is all but absent, and in the latter of which it predominates to the maximum degree over the private wishes of the parties. As has been pointed out 1/, there is a spectrum of public interest, with the ordinary dispute falling at one end and the essential industry dispute falling at the other. Historic and contemporary Canadian labour policies both evince a belief that conciliation by a public body is likely to be useful even in the normal industrial dispute and for that reason it should be undertaken regardless of the degree of essentiality involved. On the other hand, the knowledge of the parties about their peculiar problems and the fact that they bear the ultimate economic burden of settlement make their willing participation in dispute settlement highly desirable even in industries that are essential beyond question.

But to recognize the existence of a spectrum upon which all disputes can be ranked is not to answer the question of how a given dispute located on that spectrum should be handled. Rather, the "spectrum" concept is intended to remind us of the need to maintain substantial continuity in techniques of dispute settlement as between industries that are affected in varying degrees by the public interest. The causes and dynamics of labour disputes have a great deal in common despite the differences in the impact which such disputes may have on the public.

C. A Phenomenological Definition

What are the actual characteristics of labour disputes in essential industries which mark them off from the generality of industrial conflict? The very term "essential" industry indicates that the disruption of service or production has a special impact upon the community, above and beyond the harm that the ordinary dispute causes. The special impact of these disputes can be measured both quantitatively and qualitatively. As to quantity, it is certainly possible to say that essentiality increases in proportion to the percentage of the community affected. Thus, small local strikes are less likely to affect essential interests than national ones; partial shut-downs are less likely to interfere with critical interests than total shut-downs; and stoppages in industries where some alternative source of supply is available are likewise quantitatively less significant than those where no such alternatives are available. As to the quality of the dispute, economic interests, of course, will be put in jeopardy in any strike. Where, in addition, there are considerations of national defence and security, of protection of property against physical destruction or spoilage and of the security of the person, a new element is introduced. To this point, there is likely substantial consensus within the community, and as between labour and management,

that a high premium should be put on industrial peace, even to the extent that some modification of the freedom of action of the parties takes place. Much more difficult to assess is the degree to which an industry may be termed essential because the quality of community life is dependent upon its continued operation. For example, a shut-down of newspapers or broadcasting services is of dramatic significance for a community's political life, to say nothing of leisure time activities, yet can communications be termed an essential industry? Again, disruption of either local or long distance transportation, as for example during a transit strike or an airline strike, can cause considerable inconvenience, but is an industry which is essential to the convenience of the community usefully to be subjected to special dispute settlement procedures?

Another important feature of an essential industry is that a settlement in the industry may directly or indirectly impose financial burdens on all or a large segment of the community. For example, a key wage settlement in a pace-setting industry may touch off an inflationary spiral; a wage increase in hospitals or public utilities may be quickly reflected in higher rates or taxes. As will be seen, particularly in the case of governmental and quasi-governmental industries, the settlement of a labour dispute may in fact be a determination of social priorities because it forces the allocation of a portion of a fixed budget to one form of activity rather than another.

A further characteristic of essential industries is that their labour relations experiences may serve as a model, good or bad, for the rest of the economy. This point is well illustrated by the settlements in the summer and fall of 1966 involving workers on the St. Lawrence Seaway, longshoremen, and railway workers. Because government was involved, either as an employer

or as the custodian of the community interest, these highly visible negotiations may well have had a dramatic impact upon other, more conventional, disputes throughout the economy. This impact may have been exaggerated or distorted by the type of non-factual rhetoric which seems endemic to debates over government policy. Of course, the very reason for government's involvement, in either capacity, is that the industry was deemed to be an essential one.

Perhaps more important than any other feature of the essential industry dispute is the conviction of the public that "something must be done" to prevent a disruption of service or production. However logical or illogical this conviction may be, and however capable of fullfilment, a public clamour for settlement may produce political pressures for special settlement techniques that are simply irresistible. To no avail will experts advise a government that the public will really not be hurt by a shut-down of a national television network, or a strike of civic workers. As several United States commentators have noted, there is much wisdom in the rather wry limerick:

> There was a faith-healer from Diehl,
> Who said, "I know the pain isn't real,
> But when I puncture my skin,
> With the point of a pin
> I dislike what I fancy I feel".

The very fact of public opinion, then, is central to any appreciation of the need to devise effective settlement techniques for essential industries.

Yet even here there is another side to the story. It is a mark of a free and pluralistic society that there is a substantial tolerance both for deviant belief and deviant action. In the exercise of rights, minority groups will no doubt often cause public displeasure, perhaps inconvenience,

and occasionally serious disruption. Yet if we feel that the freedom value which is used to justify the disruptive or offensive action is important enough, libertarians will say that discomfort is the price that we must pay for our freedom. While the analogy from political to economic freedoms should not be made too lightly or permitted to carry us too far, it must be remembered that freedom of economic action is, and is believed to be, an important value in our society. To be sure, it is frequently over-ridden in the pursuit of some other important social objective, yet the case must be made out in each instance for the disruption of market forces. This case frequently is made out in relation to the regulation of rates, the public ownership of important facilities and in various licensing statutes. But the residue of the economy remains unregulated, and to impose controls widely throughout the labour sector would surely be seen as discriminatory.

Summarizing these three definitions, all of which have some validity and all of which overlap, it can be argued that an industry is "essential" if

(a) it has been treated as such in respect of labour disputes,

(b) it is affected to an unusual degree with the public interest, or

(c) it is one in which a work stoppage will affect a large number of non-combattants, or put in peril national defence or security, health, person or property, or even (arguably) community convenience; in which a settlement will directly or indirectly impose costs on the community; or about which public opinion is sufficiently aroused to create pressures for settlement.

For the purposes of analyzing Canadian experience to date and in order to examine the need for and the shape of a new policy, a dispute which falls

within any of these definitions will qualify as an essential industry dispute. Needless to say, such an open-ended or eclectic definition cannot be applied with precision. On the contrary, it is rooted in the conviction that definition in the abstract is not a fruitful exercise. 2/ By the use of this definition, however, a broad range of industrial relations and legislative experience can be brought within the ambit of this study without the necessity of debating the appropriateness of inclusion in each instance.

One final observation should be added. The focus of this paper is on "essential industry" disputes rather than "emergency" or "public interest" disputes. The use of the former term rather than one of the latter two is, of course, deliberately made for purposes of this study. In a sense, the "essentiality" concept is mid-way along the progression from those very limited cases where a labour dispute actually does create (or threatens to create) a danger, to that very broad class of cases where the dispute touches the public interest in a merely incidental way. At what point the public interest so invests an industry that its continued operation can be termed essential and at what point the loss of an essential service or product produces an emergency, is impossible to state,whether in advance of a dispute or during its currency. But it is not the obvious difficulty of drawing lines which poses the greatest problems of analysis. Rather, it is the use of the three terms almost interchangeably by many writers which makes impossible a purist or pedantic use of the concept of "essentiality". It would be foolish, for example, to ignore much of the United States dispute-settlement experience in the space programme which could hardly be termed "essential" or to take at face value the use of the "emergency" label as it has been applied to steel strikes which were clearly not.

Therefore, while an attempt will be made to pursue the theme of essentiality in the analysis that follows, and particularly in the recommendations and conclusions at the end of this study, frequent reference will be made throughout the descriptive material to "public interest" and "emergency" disputes, using those terms as synonyms and as another way of identifying the range of controversies with which we are concerned.

REFERENCES

1/ See Frankel, The Settlement of Public Interest Disputes, (unpublished paper, Conference on Law and Industrial Relations, Osgoode Hall Law School, May 1966).

2/ As well, a study of definitions of "essential industry" has been undertaken by Professor Pierre Verge for the Task Force. To the extent that his research does disclose patterns of definition by legislators, economists, and editorial writers, it may be possible to say that a consensus exists that certain industries are essential. More likely, a catalogue and analysis of definitions will provide a useful point of departure for draughting new legislation.

CHAPTER II

THE SCOPE OF THE PROBLEM

Most experts 1/ seem convinced that few, if any strikes inflict serious or permanent harm on the public, of either a physical or economic sort. Yet the policy implications of this detached and dispassionate view are by no means clear. As has been stated,

> There is probably little to be gained and much to be lost by misleading ourselves into dismissing the strike problem as inconsequential on the ground that rarely has the public been forced to go hungry, rarely has it been permanently injured, rarely have any lives been lost as a result of labor stoppages. Public policy is not commonly based on so Spartan a view. A general desire to keep government intervention to the minimum does not permit keeping it at less than the minimum which is publicly acceptable. 2/

Given this undoubtedly sound observation, there is much to be said for simply assuming, as the public assumes, that there is a significant problem of strikes in essential industries.

On the other hand, such an approach involves an abdication of responsibility. If, in fact, there is no special reason to be concerned about essential industry disputes, public opinion should be altered by a process of education through responsible statements by public officials and experts. Especially is there a need to alleviate public pressure for special measures if important interests of the parties are being trenched upon in the name of the common good because of an alleged "clear and present danger" which does not in fact exist. A second important reason for exploring the actual frequency of essential industry disputes is that reasonably accurate knowledge of their incidence and impact is needed in order to create suitable settlement procedures. Obviously, frequent, massive and prolonged work stoppages

might suggest that a fundamental and sweeping legislative change is warranted, while occasional small-scale strikes can either be accepted as inevitable or dealt with by some minor adjustment of the statutory machinery. Finally, there has been a tendency, at least in Canada, to use the essential industry dispute as a model for labour relations legislation. 3/ This pattern, of questionable validity in any event, becomes even less defensible if the essential industry dispute represents only a tiny fraction of all disputes.

For all of these reasons, it seems desirable to attempt to evaluate the actual frequency in Canada and abroad of disputes in essential industries.

A. The Canadian Experience: 1946-1967

An inventory has been made of Canadian strike experience in essential industries, a term which, for this purpose, includes public utilities, medical and paramedical services, transportation and communications, teachers and government. While the latter category is only arguably an "essential industry", it is included primarily because any strike of government employees tends to be viewed by the public as an extremely serious matter.

Because disputes in essential industry situations are subject to many environmental factors, such as inflation, which are present throughout the economy, a more significant gauge of their frequency is the number of strikes and the man-days lost in essential industries in relation to the general industrial relations picture.

Figure 1 shows the number of essential industry strikes in Canada in the postwar period. Putting aside transportation, in no category was there an average as high as two strikes per year. Indeed, the incidence of strikes in

FIGURE 1

ESSENTIAL INDUSTRY STRIKES IN CANADA 1946-1967
(By year and industry)

	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967*	TOTAL
PUBLIC UTILITIES (gas, heat, light, water, power)	1				2		2					1	1	1	3	1	4	3	2	9	5	3	38
MEDICAL SERVICES (including paramedical)						1												3	2		4	3	13
TRANSPORTATION (railways, shipping, air lines, trucking, bus, transit, storage)	7	11	6	5	3	5	7	8	4	7	6	5	13	4	11	8	12	11	13	24	26	6	202
COMMUNICATIONS (telephone, telegraph, C. B. C.)				1	1								1	1	1						3	1	9
EDUCATION (primary, secondary)															1			10	2	2	4	7	26
	8	11	6	6	6	6	9	8	4	7	6	6	15	6	16	9	16	27	19	35	42	20	288
GOVERNMENT																							
Federal (post office)																				1	1	1	3
Provincial														1							1	1	3
Municipal	1	2		1	2		2	1	2	2		3	5	2		5	2		3		10	4	47
	1	2		1	2		2	1	2	2		3	5	3		5	2		3	1	12	6	53
TOTAL "ESSENTIAL" STRIKES	9	13	6	7	8	6	11	9	6	9	6	9	20	9	16	14	18	27	22	36	54	26	341
"ESSENTIAL"STRIKES LESS GOVT. STRIKES	8	11	6	6	6	6	9	8	4	7	6	6	15	6	16	9	16	27	19	35	42	20	288
TOTAL STRIKES	226	234	154	135	160	258	219	173	173	159	229	245	259	216	274	287	311	332	343	501	617	432	5937
"ESSENTIAL" STRIKES AS % OF ALL STRIKES	4.0	5.5	3.9	5.2	5.0	2.3	5.0	5.2	3.5	5.7	2.6	3.7	7.7	4.2	5.8	4.9	5.8	8.1	6.4	7.2	8.7	6.0	

EXPLANATION: *1967 figures incomplete

Note: Criteria for inclusion - 1946 - 1956: stoppage involving at least 6 workers, lasting at least 1 day
1957 - 1965: stoppage involving at least 50 workers, resulting in loss of at least 250 man-days.
1966 - stoppage involving at least 100 workers.

medical services, communications and provincial and federal governments is so low, over the twenty-year period, as to be almost without quantitative significance. (No doubt as collective bargaining in these areas becomes more common, there will be a greater incidence of strikes: see, for example, the 1968 postal strike.) Public utilities, education, and municipal government show a somewhat greater frequency of strikes but still a rather small absolute number. Transportation stands out as almost uniquely important, accounting for approximately 60% of all strikes during the period in essential industries.

Much more important than these figures is the revelation that essential industry disputes are becoming significantly more common. Indeed, even Figure 1 shows that essential industry disputes have been increasing since the early 1960's, both in each individual category and in all categories viewed cumulatively. Figure 2 shows this even more conclusively by recording essential industry strikes as a percentage of all strikes. Broken down into five-year periods, these strikes ranged from an average of 4.7% of the total (1946-50) to 4.3% (1951-55) to 4.8% (1956-60). However, in the period 1961-65, the proportion climbed to 6.5% and in 1966 a new high of 8.7% was reached. The proportion of essential industry disputes dropped in 1967 but is still well above the pre-1960 averages.

Of course, the number of strikes must be judged in the light of the actual time loss. Figure 3 shows that approximately five million man-days have been lost through strikes in essential industries since World War II, with transportation clearly pre-eminent as a trouble spot. About 75% of the total time loss in essential industries was in this area. Once again, the actual incidence of time loss in all other categories was negligible until the mid-1960's. However, in the period 1965-67, public utilities strikes

FIGURE 2

SOURCE: FIG. 1

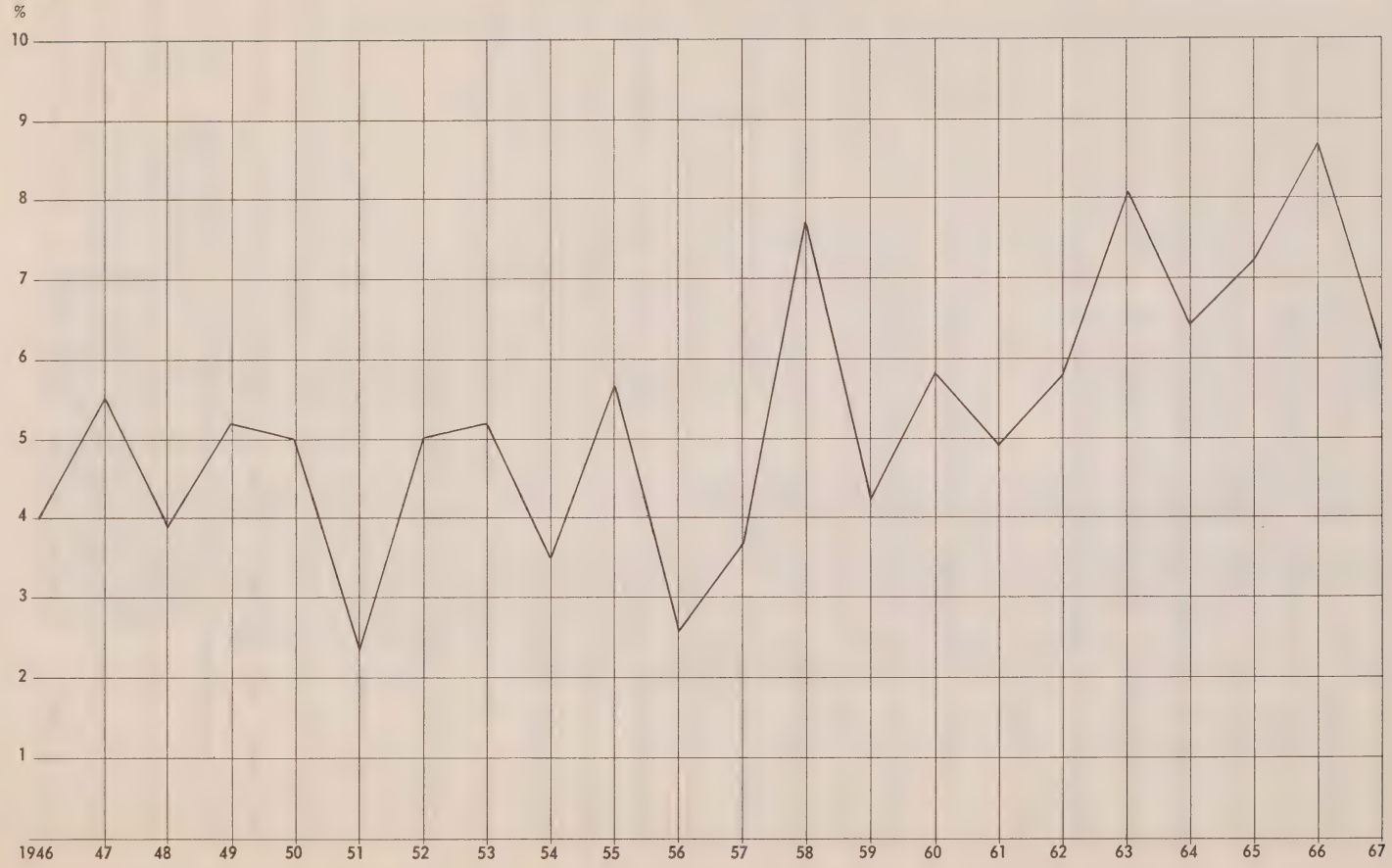

FIGURE 3

MAN-DAYS LOST THROUGH STRIKES IN ESSENTIAL INDUSTRIES IN CANADA
1946 - 1967

	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957
PUBLIC UTILITIES, (gas, heat, light, water, power)	526				2,298		3,090					638
MEDICAL SERVICES (including paramedical)						16						
TRANSPORTATION (railway, shipping, air lines, trucking, bus, transit, storage)	51,117	73,496	25,700	43,525	1,002,850	1,165	65,980	84,294	3,280	24,736	37,110	35,811
COMMUNICATIONS (telephone, telegraph, C.B.C.)				250								
TEACHERS (primary, secondary)	51,643	73,496	25,700	43,775	1,005,148	1,181	69,070	84,294	3,280	24,736	37,110	36,449
GOVERNMENT												
Federal (post office)												
Provincial												
Municipal	460	1,392		68	26,860		1,375	2,880	3,200	990		3,460
	460	1,392		68	26,860		1,375	2,880	3,200	990		3,460
TOTALS "ESSENTIAL" STRIKE LOSS	52,103	74,888	25,700	43,843	1,032,008	1,181	70,445	87,174	6,480	25,726	37,110	39,909
"ESSENTIAL" STRIKES LESS GOVERNMENT STRIKES	51,643	73,496	25,700	43,775	1,005,148	1,181	69,070	84,294	3,280	24,736	37,110	36,449
TOTAL MAN-DAYS LOST	4,515,030	2,336,340	885,790	1,036,520	1,387,500	901,620	2,765,310	1,312,720	1,430,300	1,875,400	1,246,000	1,447,100
"ESSENTIAL" STRIKES LOSS AS % OF ALL STRIKE LOSS	1.2	3.2	2.9	4.2	74.4	.1	2.5	6.6	.4	1.4	3.0	2.7

1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	TOTAL
200	40	1,420	430	3,890	1,120	1,130	27,750	96,040	98,190	236,762
					9,050	3,590		430,540	11,380	454,576
91,180	14,830	24,880	40,220	361,630	55,590	50,620	234,970	1,540,420	246,930	4,110,334
300	70,010	220						10,560	1,580	82,920
		1,410			8,240	11,130	18,480	56,620	333,680	429,560
91,480	84,880	27,930	40,650	365,520	74,000	66,470	281,200	2,134,180	691,760	5,314,152
							89,830	1,430	1,270	92,530
	2,880					*		91,200	6,000	106,670
4,440	450		8,310	790		19,930		138,750	127,590	340,945
4,440	3,330		8,310	790		19,930	89,830	231,380	134,860	540,145
96,120	88,210	27,930	48,960	366,310	74,000	86,400	371,030	2,365,560	826,620	5,847,707
91,680	84,880	27,930	40,650	365,520	74,000	66,470	281,200	2,134,180	691,760	5,314,152
2,816,850	2,226,890	733,700	1,335,080	1,417,900	917,140	1,580,550	2,349,870	5,178,170	4,045,080	43,771,360
3.4	4.0	3.8	3.7	25.8	8.1	5.5	15.8	45.7	14.3	11.0

SYMBOLS: * Saskatchewan doctors strike omitted
** 1967 Figures are preliminary

Criteria for inclusion as in Figure 1

were responsible for the loss of over 220,000 man-days; 442,000 man-days were lost in medical service occupations; 410,000 man-days were lost by teachers; about 95,000 each by provincial and federal government employees; and over 250,000 by municipal employees. Over 66% of all man-days lost in essential industries from 1946 to 1967 was lost during the last three years of the period. About 45% of the 5.3 million man-days lost in this entire period was lost in 1966 alone. Any change that may have occurred either in absolute numbers or in the relative size of the work force in essential industries from 1945 to 1967 could not account for a development of this magnitude.

When the total of man-days lost through strikes in essential industries is seen as a percentage of the annual strike loss for all industries, the existence of a growing problem of these critical strikes is corroborated (see Figure 4). It is true that in 1950 essential industry disputes actually amounted to 74.4% of the total (due to a national railway strike) and that this percentage was not even approached in the early 1960's when essential industry disputes were becoming more numerous. In 1962 and 1966, the most turbulent years of this period, essential industry time losses accounted for about 26% and 45.7%, respectively. 4/ But even when these unusual years are put aside, the growing relative importance of essential industry disputes is unmistakable. In the period 1946-50 (excluding 1950, the year of the rail strike) the time loss in essential industries was 2.9% of the total; in the next two 5-year periods, 1951-55 and 1956-60, the time loss was 2.2% and 3.4%, respectively. However, in the period 1961-65 this grew to 11.8% of the total; even excluding the two unusually high years of 1962 and 1965, the average was 5.8%. Looked at in another way, in the 15-year period 1946-60, only twice did essential industry strikes exceed 5% of the total time loss: 74.4% in 1950 and 6.6% in 1953. But in the 5-year period 1961-65, the 5% mark was

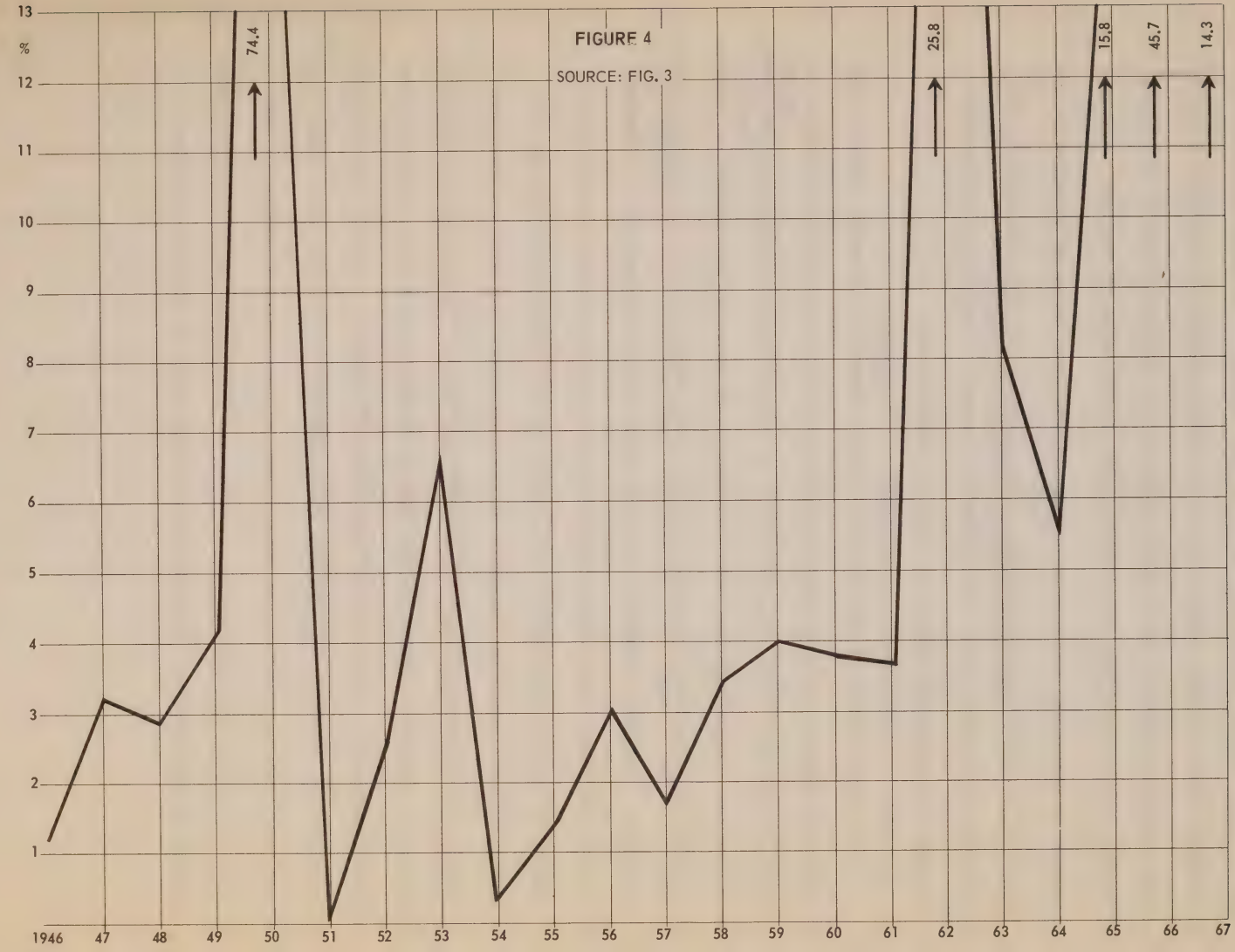

FIGURE 4

SOURCE: FIG. 3

exceeded four times: 25.8% in 1962, 8.1% in 1963, 5.5% in 1964 and 15.8% in 1965. 1966 and 1967 are both amongst the highest years since the war, indicating that the next 5-year period is almost certain to register a further substantial increase. Once again, however, it must be stressed that these figures do not take account of any change in the size of the work force employed in essential industries, either in absolute terms or relative to the rest of the economy. Nonetheless, even allowing for any such change, the conclusion is still clear that industrial peace is more often disrupted by strikes in essential industries than it formerly was.

One other index of the extent to which essential industry disputes are a growing problem is the degree to which they are above or below average in terms of man-days lost per strike. If a strike in essential industries tends to involve a below-average loss (because it is short or the number of workers involved is small) the problem is less intense than if such a strike is above-average. Figure 5 suggests, in fact, that the average essential industry strike has grown more intense because the ratio of man-days lost to total number of strikes has become more nearly equal. For example, during the period 1951-55 essential industry strikes accounted for 4.4% of the total number of strikes but only 2.2% of the time loss. Therefore, the average essential industry strike was only about 50% as intense as strikes in other industries, i.e., the loss per strike was 50% less. By 1961-65 the intensity of essential industry strikes was about average (if the two worst years are excluded from calculation) or double that of the ordinary strike (if all years are taken into account). In 1966 and 1967 essential industry disputes appear to have become far more intense than those in other industries.

FIGURE 5

INTENSITY OF ESSENTIAL INDUSTRY STRIKES

	1946-50	1951-55	1956-60	1961-65
Number (as % of all strikes)	4.7	4.3	4.8	6.5
Man-days (as % of all strikes)	17.2[1] / 2.9[2]	2.2	3.4	11.8[3] / 5.8[4]

1. actual 5 year average.
2. excluding 1950 (74.7%).
3. actual 5 year average.
4. excluding 1962 (25.8%) and 1965 (15.8%).

However, the matter must be viewed in perspective. Even if the most pessimistic interpretation is placed on all of these statistics, the worst that can be said is that the essential industry dispute in Canada is a problem of significance, and probably growing significance. The major source of industrial conflict is found in other areas of employment. Even the complete elimination of strikes in the critical situations here under review would leave largely untouched the totality of conflict which affects the Canadian economy.

B. The United States Experience: 1946-1967

Evaluation of the United States essential industry strike experience is much more complicated than the study of the Canadian experience. To identify essential industries arbitrarily as those involving public utilities, medical and paramedical services, transportation and communications, schools and government, is of dubious validity in Canada. In the United States it is an even more questionable exercise, for a number of reasons:

1. In the United States the impact of labour disputes on national interests has been recognized both as a factual and as a constitutional matter. The enactment of the federal Taft-Hartley legislation has therefore tended to focus attention on national rather than local crises, and only communications and transportation, of all the industries and services listed above, meet the test of national jurisdiction.

2. On the other hand, the very fact that bargaining tends to be national in scope may make a shutdown in such industries as steel and automobile manufacturing and coal mining much more of a national crisis than in Canada.

3. The tremendous size and sophistication of United States industry may well mean that the impact of a strike is not only felt more widely but more intensively as well. This impact may be made even more intense to the extent that the United States economy is less dependent on imports and thus more vulnerable to disruption by reason of internal causes.

4. The international commitments of the United States have a profound impact on the domestic scene. Industries such as aerospace, atomic energy and defence become "essential" because a strike might have the effect of interfering with the nation's pursuit of important foreign policy objectives.

5. For constitutional reasons, as will be seen, state legislation has been restricted to disputes that are "emergencies" rather than those that simply affect essential industries, a much broader concept. Since the Taft-Hartley legislation is also "emergency" legislation, the essential industry category has not been carefully defined.

6. In political terms, the "emergency" label has been used by members of both the executive and legislative branches to justify initiatives (or the avoidance of initiatives) in dealing with major strikes. Perhaps the somewhat more restrained level of Canadian political debate and our history of intervention in important labour disputes gives the term "emergency" more dramatic impact in Canada than in the United States.

To sum up, the factual substratum of the United States experience differs substantially from that of Canada and the tendency has been to categorize disputes as "national emergencies" rather than as essential, without regard to their local or national impact.

However, several attempts have been made to define and measure the incidence of "essential industry", "national emergency" or "public interest" strikes.

Perhaps the most extensive work has been that of Chamberlain and Shilling. 5/ These authors constructed an elaborate scale on which could be registered the ramifications of strikes upon the various segments of "the public" affected by them as well as the cumulative measurement of their impact on the whole community. This scale, which the authors termed an "urgency rating", was applied to strikes in the coal, steel and railway industries, with results that are revealing, if somewhat frustrating. On their index, railway strikes were clearly demonstrated to rank much lower than coal or steel strikes while a local transit strike would cause much less loss than a strike in a large auto plant. Paradoxically, public opinion is undoubtedly more concerned with a disruption of transportation than with a manufacturing strike.

Since "emergency" or "essential industry" strikes are being identified for the purpose of devising special settlement procedures, the Chamberlain-Shilling conclusions bear repetition:

> ...(T)he classificatory approach to identifying strikes which should be controlled...will blanket some strikes which entail far less public hardship than others which are left without restriction. It will leave uncontrolled some strikes which can be seriously injurious to the public.... (S)trikes cannot be classified in advance by degree of public effects because even within the same industry or firm the nature of the effects varies with underlying conditions. 6/

Another study, by Professor Bernstein, also attempted to measure the economic impact of strikes in key industries. 7/ He identified six factors as the hallmarks of disputes which might be described as national emergencies:

1. the industry is highly unionized,
2. its product or service is "essential",
3. its market is national rather than local,
4. the scope of bargaining is such that a strike would shut down the industry,
5. employees are represented by one union, or several unions acting in concert,
6. collective agreements in the industry must expire at the same time.

Bearing in mind that the Bernstein study, like that of Chamberlain and Schilling, was primarily designed to test the economic impact of strikes rather than the social or psychological or political impact, and that the stated criteria reflect to some extent the premises of the Taft-Hartley Act, his conclusions are still relevant. Of 51 heavily unionized industries, only three met Bernstein's six criteria: coal, iron and railways. During a 10-year period (1945-54) only seven strikes occurred in these industries, of which but two were rated as emergencies 8/, while four were termed "serious" and two merely involved some inconvenience. The period selected for study is also of significance because it embraced the critical months at the end of World War II, the era of post-war readjustment, and the Korean War. These traumatic national experiences, it might be thought, would have lowered the threshhold of emergency, but this does not seem to have been the case.

Other work by Professor Bernstein 9/, directly focused on the coal industry, yielded a negative answer to the question of whether coal strikes constituted national emergencies. If, on the other hand, the criterion of national impact were set aside, Professor Bernstein would apparently be

prepared to extend the "emergency" label to a somewhat broader class of controversies. He suggests that "emergencies", properly defined, involve hardship rather than inconvenience, that such hardship must be actual rather than potential, and that the impact of the "emergency" must fall upon the whole community. 10/

A recent analysis of national emergency disputes proceeds on an approach similar to that of Bernstein but emphasizes that the "emergency" must be actual and immanent, rather than the ultimate prospect of a potentially long strike. 11/ Predictably, this study also expresses scepticism about the intensity of the emergency disputes problem.

Perhaps the most exhaustive canvass of both primary and secondary sources relating to disputes in essential industries is the work of Northrup and Bloom. Their clear "free enterprise" bias must be kept in mind in evaluating their findings but, even making due allowance for this bias, their conclusion as to the economic justification of legislation relating to emergency disputes is significant: 12/

> RAILROADS
>
> The closest approximation to a national emergency strike was probably the railroad operating strike of 1946.... If the threat of drastic legislation had not ended this strike so quickly, a very grave emergency might have resulted.... It is quite probable that a nationwide railroad strike today would have a considerably smaller impact.
>
> BITUMINOUS COAL
>
> Nationwide bituminous coal strikes...were widely publicized as emergencies. But because of the critical oversupply of coal, a strike was usually "an inescapable layoff by another name"....
>
> (M)ost of these strikes did not involve hardship for many communities.... (It is) unlikely that coal strikes will assume emergency proportions soon again.

STEEL

The late Professor Sumner H. Slichter, writing in 1947, believed strongly that "a general steel strike of 100 days would be disasterous." Yet the 1959 steel strike lasted 116 days, "and the brink of disaster was not even clearly in sight...." It will also be recalled that a 55-day strike shutting down the steel industry in 1952 caused neither a civilian catastrophe nor an impediment in the Korean War effort.... A very careful study of the impact of steel strikes made after the 1959 stoppage reinforces previous conclusions that the economic impacts of steel strikes "on the economy are usually seriously exaggerated...."

MARITIME AND LONGSHORE

The main effect of the 1961 strike by the National Maritime Union on others, according to a survey by the New York Times, was to have "the minor role of the United States Merchant Marine in the nation's commerce...pointed up. The strike...had a negligible effect on import and export traffic..."

Longshore strikes have a greater effect, but...(a) number of such strikes have occurred with no catastrophe or emergency in sight....

TRUCKING

Trucking strikes have resulted in the invocation of emergency laws in Massachusetts and Nebraska, but not on the national scene. The increased importance of this industry as a freight carrier and...a nationwide over-the-road contract, could result in a serious situation, perhaps in time even comparable to the 1946 railroad strike....

UTILITIES

...A few serious strikes have occurred..., but they are becoming less likely.... The impact...has usually been negligible in the case of all utilities except urban transit and merely troublesome in the case of the latter.

This survey concludes with the observation that "...the economic basis... for emergency strike control legislation does not appear to rest upon substantial evidence." 13/

Conceding the policy biases of the authors, it must be added that the literature in general discloses no compelling evidence which would cast doubt upon their conclusion.

Yet despite the frequent and persuasive proof by economists that there are few strikes that can properly be labelled "emergencies", there exists a sizeable body of both expert and lay opinion which makes qualitative rather than quantitative judgments about the impact of a strike on the nation or the community. For these persons, any adverse effects upon vital community interests are equivalent to an "emergency", regardless of the measurable losses in money terms.

One distinguished author has sought to define these "public emergency disputes" as those "...in which the public is unwilling or unable to permit a work stoppage to perform its collective bargaining function because of the peril, costs, or inconvenience that would be entailed." 14/ Another has made more specific reference to situations in which "...the need for continuous service is more important than the freedom of the parties to fight: 1. Hospitals and institutions, 2. Railway transportation, 3. Production of electricity for light and power.... A nationwide stoppage in the coal industry or the steel industry would also soon become a national disaster."15/ A third defines a national emergency dispute as "...one which has resulted in a dangerous curtailment of supplies of necessary goods or services where substitutes are not available." 16/

Each of these rather loose definitions is open to criticism. The public's willingness to tolerate a strike is certainly an inaccurate measure of its genuine impact on the community. One study which measured newspaper coverage of major industrial disputes (an index of public concern) showed that there was little correlation between popular indignation and actual or potential harm. 17/

For example, one writer characterized the New York transit strike and the airline strike of 1966 as the most serious strikes of the year and as examples of the sort of disputes warranting special "emergency" treatment.18/ No doubt these strikes did evoke pronounced public concern but to term the inconvenience created by them an "emergency" is hardly a useful exercise. Turning to the possibility of identifying those situations in which the "needs" of the community should outweigh the "freedom" of the parties, the obvious value judgments implicit in both the phrasing of the test and its application make this a poor guide indeed.

Finally, even the test of whether a "dangerous curtailment of supplies of necessary goods or services" has been caused by a strike, is not really useful. When has a shortage become dangerous? What goods or services are necessary? The problems of defining these broad terms and of ascertaining the facts of a given situation are almost insurmountable. This is illustrated by recent experience under the Taft-Hartley Act.19/ In 1961, a maritime dispute was found to be an emergency although only 8% of United States foreign trade moves in ships flying the United States flag (and subject to United States labour laws). In 1967, a shipbuilding strike was held to be an emergency because of its impact on the prosecution of the Viet Nam war although none of the ships affected were destined for completion for at least three years. In neither case does the "dangerous" label seem to be wholly appropriate.

Thus, qualitative analysis hardly proves more helpful than quantitative.

A final possibility is to categorize as "emergencies" at least those disputes to which either the legislature or the executive has responded by special measures designed to end the stoppage of work. Using such

extraordinary action as the hallmark of some special public interest in a dispute, and of some special harm suffered because of it, the following are the approximate dimensions of crisis: from 1947 to 1965 the Taft-Hartley emergency provisions were invoked 25 times; 20/ from 1947 to 1966 the emergency provisions of the Railway Labor Act were invoked 127 times in respect of railways and airlines, following which 34 strikes occurred; 21/ and since 1945 the United States government has 13 times seized industrial or transportation facilities without statutory authority in order to bring an end to the dispute. 22/ Quite apart from its incompleteness, it must be conceded that this analysis too is without profit because it assumes that the executive and legislature react only to genuine emergencies, and to all such emergencies. Such assumptions are patently silly.

The only possible conclusions that emerge from an examination of the literature are (1) that the emergency dispute problem is thought by most writers to be exaggerated 23/, and (2) that no statistical measurement of the cost, impact or incidence of strikes in essential industries is possible because of the impossibility of identifying such industries and because the facts of each situation must be separately considered. 24/

C. Non-North American Experience: 1946-1967

Any attempt to measure the comparative incidence of essential industry disputes is an exercise in folly.

First, the very notion of "essentiality" may vary tremendously from country to country since it reflects such variables as size, climate, degree of industrialization, dependance on exports, and international political obligations. Second, the frequency of essential industry disputes is to some degree affected by the general climate of industrial relations: are essential

industries more dispute-prone than others in the country? Thus we would have to look to general strike statistics as well as those relating to specific industries. Third, the outbreak of industrial conflict may be perfectly acceptable in the prevailing scale of values in some industrial relations systems and automatically condemned in others. Fourth, even if some common unit of measurement could be developed to test the degree to which other countries are troubled by essential industry strikes, the data is not available to which it could be applied. Strike statistics are notoriously inaccurate and the basis of surveys tends to vary as between countries.

But beyond all of these considerations there is the primary concern that nothing would in fact be proved by establishing that Canada is relatively better or worse off than other countries. The real measure of our success in dealing with essential industry disputes is whether our record meets our own standards and expectations in the light of the practical realities of our domestic situation.

For these reasons, no attempt has been made to canvass the major industrial relations systems of Western Europe or Australasia. Instead, a brief list of some of the more important post-war strikes has been compiled which does no more than confirm the fact that the problems confronting Canada are by no means unique. Other countries have suffered strikes in essential industries as well. (See Figure 6)

In addition, in a number of countries (especially in Scandinavia) the practice of industry-wide bargaining has of course magnified the impact of a strike whenever it occurs and this impact has been greatly intensified by the technique of a general strike or lockout. On the other hand, in France and Italy many of the work stoppages involving essential industries are 24-

FIGURE 6

FOREIGN STRIKE EXPERIENCE (SELECTED EXAMPLES)

COUNTRY	YEAR	INDUSTRY
Sweden	1947	police (threatened strike)
	1951	nurses (threatened strike)
	1955	merchant seamen
	1966	teachers
Finland	1955	civil servants (railways, post)
	1956	general strike
	1963	civil servants (railways, post)
Denmark	1946	packinghouse workers
	1950	agricultural workers
	1956	merchant seamen
	1965	radio telegraphers
Norway	1964	general strike (threatened)
United Kingdom	1955	railways
	1958	London bus drivers
	1961	teachers (Scotland)
	1962	railways, subways
	1964	post office
	1965	longshoremen
	1966	merchant seamen
France	1966	public utilities, garbage, trains
	1967	public utilities
	1967	general strike (demonstration)
Belgium	1964	doctors
New Zealand	1967	bus, train
Australia	1948	railways
	1949	coal mining
	1965	bus, train
	1967	airlines

or 48-hour demonstrations rather than prolonged tests of economic strength designed to procure collective bargaining objectives. Even the more lengthy stoppages of 1968 (especially in France) were in large measure political and social protests against the regime rather than conventional economic conflicts.

To reiterate, this highly selective list of essential industry strikes simply shows that this country is not uniquely plagued by such conflict. Other countries, some with enviable records of labour peace, some uncommitted to the vagaries of collective bargaining, have also had to confront a disruption of essential services.

D. Conclusion

The attempt to define the scope of the essential industry dispute problem began with a judgment that there are few strikes, if any, that impose permanent losses on the parties or on the public. While there is no data in either the United States or Canada which either conclusively confirms or disproves this judgment, an examination of actual experience tends to support it. Perhaps the most dramatic essential industry strike was the Saskatchewan doctors strike in 1962. Despite dire predictions, there does not seem to have been actual harm to the health of those in need of medical treatment. Somehow an acceptable minimum level of care was maintained, partly by emergency service established by the strikers, partly by non-striking doctors, partly by the importation of doctors from abroad. In the Quebec hydro strike of 1967, again the predictions of chaos and disruption of community life proved to be inaccurate. No lives were lost nor was any property permanently damaged. In the United States steel strike of 1952 President Truman had seized the steel industry in order to avert a danger to the nation which was

then in the midst of the Korean War. When this seizure was invalidated on constitutional grounds, a 55-day-long strike occurred with no discernible harm to either the war effort or to domestic production.

The experience, so far as a random survey shows, has been the same in the various essential industry disputes over the past 20 years. While there has often been inconvenience, there has seldom been danger. As to economic losses, these have no doubt occurred; both parties and non-belligerents have suffered. But how much of the loss is offset by pre- and post-strike economic gains is almost impossible to assess. The only thing that can be said with certainty is that the estimates of loss always exceed the actual losses.

REFERENCES

1/ See e.g., Bernstein, The Economic Impact of Strikes in Key Industries in Bernstein et al, (eds.), Emergency Disputes and National Policy, at p. 24, ff. (1955); Northrup and Bloom, Government and Labor, pp. 422, ff.; Warren, Thirty-Six Years of "National Emergency" Strikes, 5 Ind. and Lab. Rel. Rev. 1 (1951-2).

2/ Chamberlain and Schilling, The Impact of Strikes: Their Social and Economic Costs, at pp. 252-3 (1954).

3/ See Chapter III, infra.

4/ In 1962 the major strike involved the Ontario trucking industry; in 1966 a national railway strike and a teachers' strike in Quebec made major contributions to the unusually high time loss in essential industries.

5/ Chamberlain and Schilling, op. cit. supra, ref. 2.

6/ Id. at p. 253.

7/ Bernstein, op. cit. supra, ref. 1, at p. 22.

8/ Cf. Horlacher, A Political Science View of National Emergency Disputes, 333 The Annals 85 (1961). This author feels that none of the five post-war steel strikes brought the country to its knees or constituted a genuine disaster.

9/ Bernstein and Lovell, Are Coal Strikes National Emergencies?, 6 Ind. and Lab. Rel. Rev. 352 (1953).

10/ Bernstein, State Public Utility Laws and Mediation, 1956 Lab. Law Jo. 496.

11/ Crossland, Public Interest Labor Disputes: An Economic and Legal Analysis Beyond the Pale of Title II of the Taft-Hartley Act, 12 Wayne L.R. 780 (1966).

12/ I. Northrup & G. Bloom, op. cit. supra, ref. 1, at p. 421 ff.

13/ Id. at pp. 424-5.

14/ Taylor, The Adequacy of Taft-Hartley in Public Emergency Disputes, 333 The Annals 76 at p. 77 (1961).

15/ Slichter, The Challenge of Industrial Relations, at p. 165 (1947).

16/ Warren, op. cit. supra, ref. 1, at p. 13.

17/ Id.

18/ See Curtin, National Emergency Disputes Legislation: Its Need and its Prospects in the Transportation Industries, (1967) 55 Geo. L. J. 786.

19/ Id.

20/ Op. cit. supra, ref. 11, p. 798, n. 91; see, for a much fuller account, Blackman, Presidential Seizure in Labor Disputes (1967).

21/ Dunlop, Procedures for the Settlement of Emergency Disputes (unpublished address, 1967).

22/ Yabroff and Willis, Federal Seizures in Labor-Management Disputes, 1917-1952, (1953) Mthly. Lab. Rev. 611.

23/ Cf. The Public Interest in National Labor Policy (Independent Study Group, Committee for Economic Development, 1961) p. 94.

24/ Cf. Seitz, Group Thinking and Emergency Disputes, 1 Lab. L. J. 869 (1950).

CHAPTER III

ESSENTIAL INDUSTRY DISPUTES LEGISLATION IN CANADA

A. The Constitutional and Economic Environment

Modern Canadian legislation dealing with essential industry disputes is affected to a substantial extent by the pressures of constitutional doctrine. This was not always so. In the early years of experimentation with labour policy, federal and provincial laws, often based on different philosophies, appear to have developed contemporaneously without awakening constitutional controversy. In general terms, by 1907, a full-blown federal conciliation statute had emerged as well as a number of provincial conciliation and arbitration laws that involved varying degrees of compulsion. The federal statute provided for compulsory postponement of strikes pending conciliation and covered "any mining property, agency of transportation or communication, or public service utility". 1/ This list of industries includes many which, by any definition, might be termed "essential". Most of the provincial statutes, as will be seen, similarly covered critical employment situations, including some which fell within the coverage of the federal act. Until 1925, however, questions of constitutional jurisdiction do not appear to have loomed large in the development of legislative policy.

In that year, the Judicial Committee of the Privy Council decided the Snider case 2/, which held that a labour dispute in a local public utility was constitutionally immune from regulation under the 1907 federal statute. The Snider decision is notorious as the obstacle to federal regulation of labour relations in general 3/, but what is important here is its significance for the regulation of essential industry disputes in particular. Given the fact that after the Snider case jurisdiction over labour relations must

be regarded as primarily provincial, what remained in the federal sphere was nonetheless significant: interprovincial and international communications and transportation, defence and atomic energy, and certain industries owned or closely regulated by the federal government. This brings within the ambit of federal labour legislation such key areas of employment relations as longshoring, airlines and railways, uranium mines, and shipping. 4/ As well, the federal government obviously has power to regulate legislatively its relationship with its own employees. From this enumeration it is clear that although some essential industries lie beyond federal regulation, much of what is federal is essential, or arguably so. Those essential industries (such as local utilities and hospitals) that remain within provincial control are unlikely to produce crises of national significance. Conversely, although provincial law governs local essential industry disputes, the primary business of provincial labour departments is with the normal manufacturing, service, or construction firm.

Thus, provincial and federal legislators and administrators can be expected to have their views of policy colored by the preponderance of the problems constitutionally assigned to them. It is at least arguable that the federal government may run the risk of instinctively over-reacting to crisis or the threat of crisis because it does not have the experience of normal collective bargaining upon which to base a strong faith in the potential of voluntarism. To some extent, this hypothesis is borne out by the criticism of compulsory conciliation as a detriment to industrial peace. 5/ The provinces, with their broader experience, have begun to draw back from compulsory conciliation in order to promote collective bargaining. 6/ The federal government, on the other hand, as will be seen, has been moving steadily in the direction of intervention in the bargaining process.

Unfortunately, the hypothesis that the federal government "overreacts" must be rejected, because it does not accommodate one important fact: the provinces have also been moving with increasing frequency to outlaw essential industry strikes.

A second feature of the constitutional framework must also be considered. Although the Snider case consigned labour relations to the provinces, except for a few industries that fell within enumerated heads of federal power, there still remained the possibility that in circumstances of national emergency, federal authority might be invoked. For example, in the event of war, federal power may constitutionally be mobilized to regulate industrial relations in the national interest. However, one of the unanswered questions of Canadian constitutional law is whether some less catastrophic event, such as a nation-wide strike in an important industry normally falling within provincial jurisdiction, would equally attract federal jurisdiction. 7/

The Snider case itself suggests the answer:

> No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s.91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for.... 8/

> No great national emergency was shown to have existed when the statute was enacted in 1907, or to have occurred since, and the statute was not framed so as to come into operation only when such emergency arose. The statute was further not framed so as to confer the drastic powers that would be necessary in such a case, but was based on the normal working of industrial relations which often required time and patience and some restraint, if dislocation was to be avoided.... Several Provinces had on their statute books legislation of much the same kind. Even granting the national importance of the question, the whole success of this

> method of dealing with it depended on the capacity to seize on local disputes and their conditions, and to manage the exercise of civil rights in relation to them. The circumstance that the dispute might spread to other Provinces was not enough in itself to justify Dominion interference, if such interference affected property and civil rights.... 9/

As examples of "great national emergency", the Privy Council added to the conventional quartet of "war, famine or rebellion " 10/ and "epidemic of pestilence" 11/ the possibility of "intemperance...so great and so general that...it was a menace to the national life of Canada." 12/ This dipsomanical doctrine offers comparatively limited prospects for federal intervention in a nation-wide steel or meat packing strike. Moreover, even if it were conceded that a particular local dispute attracted federal jurisdiction because of its national impact, this would not provide the permanent federal framework of legislation that would be necessary for the development of a sound and lasting labour-management relationship. Until the dispute reached crisis proportions, it would be governed by provincial law.

Fortunately, in terms of the effective regulation of disputes in key industries, the absence of federal power has not been catastrophic, if only because practical men appear not to be unduly influenced by constitutional niceties. For example, a major trucking strike in Ontario in the summer of 1966 disrupted both local and interprovincial transportation. Without attempting to draw lines of demarcation between their respective jurisdictions, both federal and provincial governments intervened co-operatively to provide conciliation services. Perhaps this collaboration reflected a lesson learned from the much less happy attempt at federal-provincial mediation of a nation-wide meat packing strike in 1947. An attempt to co-ordinate peace-keeping efforts through a meeting of federal and provincial representatives

terminated in acrimonious debate and officials of the various governments went home "nursing their provincial autonomies." 13/ In due course, the strike was settled without any official government action.

Of course, this entire discussion is predicated on the assumption that the list of essential industries should be expanded to include those that are of unusual significance to the economy. As a value judgment, this is debatable. But assuming that we wished to achieve this objective, and that the required legislation would be provincial rather than federal, what practical problems are presented by the constitution?

To the extent that constitutional jurisdiction has been responsible for a pattern of localized rather than nation-wide bargaining, it might be thought to have contributed to the avoidance of national emergencies. The shutdown of a producer of an important industrial product will not have as serious an impact upon the nation's economy if another producer in another province can to some extent alleviate the shortage. However, as will be seen, this apparent constitutional gratuity is of little practical significance in any event.

The organization of the nation's economy, like its constitution, should in theory exert a centrifugal influence on the formulation of policy. Ontario, at least until recently, has been the major focus of the nation's steel industry and of automobile manufacturing. Oil production is still largely localized in Alberta and coal mining has been primarily confined to that province and to Nova Scotia. Thus, provincial rather than federal authorities have assumed the responsibility for settling disputes in these important industries. Yet the theoretical handicap of provincial decision-making is partially offset by the concentration of industry. So long as the dispute is confined within a single jurisdiction, effective legislative and administrative

action remains possible. Ontario, for example, can and regularly does keep the peace in the nation's steel industry.

The relatively small scale of heavy industry in Canada, and the availability of imported goods, further diminishes the importance of disputes in major manufacturing industries and their impact upon the national welfare. In this connection, Canada's role as a middle power, modest military establishment, and freedom from the heavier burdens of cold-war politics, have spared her the mixed blessings of a significant "defence" industry and of the attendant risks of labour disputes in that industry.

These characteristics of Canadian industrial organization alleviate many of the difficulties of defining national emergency, essential industry, and public interest disputes which have plagued United States writers. 14/ At least, it is more difficult to assert in Canada than in the United States that a prolonged labour dispute in the automobile, aircraft or steel industries poses a threat to national security and economic stability. By the same token, the terms of contract settlements in those industries, though significant, probably do not create the same repercussions throughout the economy as do comparable settlements in the United States. In peacetime, disruption of transportation stands almost alone in this country as an emergency or public interest situation of national dimensions.

At the provincial level, the "essential" label is largely reserved for industries that touch public health and safety, but even provincially there are pressures to expand the list, especially where the local economy is based entirely upon a single industry, dependent on a single service or facility, or symbolically hitched to the star of a spectacular new development project.

Finally, public ownership of many crucial community services is fairly widespread in Canada. For example, the federal government owns one of two major railway systems, one of two major airlines, and one of two national communications networks. Most major ports are operated under the direction of harbour commissioners appointed by the federal government and key ferry services connecting two island provinces to the mainland are government-owned. Provincial and municipal governments, as well, own and operate a broad range of public utilities including electricity and gas production and distribution, local transit and ferry services, and (although its relevance to this analysis is marginal) a monopoly on the retail sale of alcoholic beverages.

To the extent that government's participation in industrial relations as an employer heightens the public interest in a labour dispute, a fairly interventionist philosophy might be expected to prevail in the public sector of Canadian industrial relations. As will be seen, however, the trend is otherwise, and public ownership is not itself a badge of essentiality or of the existance of exceptional public interest in a particular industry. On the other hand, public ownership may often involve a monopoly or oligopoly situation in which disruption of service or production has a particularly serious effect. A strike against a municipal transit commission that operates all forms of public transportation will create much greater dislocation in the community than a strike against a privately-owned subway system which leaves unaffected alternative modes of travel such as buses. Similarly, a nation-wide strike on one of the two major railway systems, each of which enjoys certain local monopolies, would cripple Canada's economy to a much greater extent than a strike in one of several competing local lines. In vast mining and farming areas, service is provided by one carrier whose

operation is the only means of bringing supplies into the community and taking its single product out.

By way of conclusion, then, there do not seem to be significant constitutional obstacles to the handling of disputes in essential industries, except in situations where economic importance rather than danger to life, health and security is the touchstone of essentiality. Even in relation to industries that are critically important to the nation's economy, there should be relatively few practical problems. The federal government has control over interprovincial and international communications and transportation while public utilities and important manufacturing concerns tend to operate within a single provincial jurisdiction, thus permitting a unified legislative and administrative approach. The real danger is that bargaining in a single "essential" firm or industry may occur on a nation-wide basis but within the fragmented framework of a number of dissimilar provincial laws. When conflict breaks out the federal government has only limited ability to intervene and intervention is likely to be less effective because it is unfamiliar and occasional. To some extent, however, even this danger appears to be overcome by supralegal arrangements between the parties and between governments.

B. Early Canadian Legislation: 1877-1939

Down to the advent of collective bargaining legislation on the Wagner Act model in the 1940's 15/, Canadian labour statutes had two distinctive characteristics. First, there was a tendency to view the essential industry dispute as the typical dispute, and second (perhaps as a reflection of the first point) there was an almost obsessive concern with peacekeeping.

The essential industry dispute initially attracted the attention of federal legislators in 1877, when an act was passed which in effect outlawed strikes on railways and public utilities by imposing criminal penalties on employees who interrupted service by breaching their contracts of employment. 16/ This draconian approach soon gave way to a series of early peacekeeping experiments. Several of these experiments, both provincial and federal, were attempts to establish a general formula for the conciliation of all labour disputes; 17/ virtually all of these were stillborn. 18/ Of greater practical significance were statutes providing for mediation, conciliation or arbitration of disputes affecting coal mines 19/, railways, and public utilities 20/, at the provincial level, and ultimately all three critical areas at the federal level. 21/

The earliest statutes required both parties to agree to the invocation of conciliation procedures 22/, but gradually this requirement was displaced by provision for conciliation either on the unilateral request of one party 23/ or as the result of governmental initiative. 24/ While the burden of agreeing to conciliation was shifted from the parties, it was replaced by a much heavier one: they were obliged to refrain from open conflict until all peacekeeping procedures had run their course. 25/

The federal Industrial Disputes Investigation Act (I.D.I.A.) of 1907, embodying these principles, covered workers employed "in any mining property, agency of transportation or communication, or public service utility" 26/ or any other enterprise where the parties to the dispute agreed to invoke the Act's procedures. Basically designed as essential industry dispute legislation, this statute was to serve as virtually the only effective instrument of Canadian labour relations policy for over 30 years. Although the Snider

decision, as has been seen, confined the operation of the I.D.I.A. to industries that came under federal legislative jurisdiction, this handicap was largely overcome by provincial enabling legislation. By 1932, virtually every province had provided for the Act's operation within employment relationships which were subject to provincial jurisdiction. 27/ In this manner, the I.D.I.A. survived until the outbreak of World War II when, as will be seen, a federal order-in-council prolonged its life and expanded its coverage to include war industries.

Thus, for decades, Canadian labour relations policy was in fact specially designed to deal with essential industry disputes. Two further developments tend to underline the historical significance of the essential industry dispute. First, the 1903 federal Railway Labour Disputes Act 28/, re-enacted as the Conciliation and Labour Act of 1906 29/, continued in force throughout the entire pre-war period and even remains on the books to the present day. 30/ While it has apparently not been used for decades, its survival is at least a symbolic recognition that the special impact of a railway strike deserves special legislative treatment. More significantly, the use of commissions of inquiry and of royal commissions appears to have developed during the period 1900 to 1939 31/, as a technique of post-conciliation intervention in critical strike situations. The utility of these ad hoc fact-finding bodies in the contemporary context will be discussed below. What is stressed here, however, is their ancient pedigree as a means of dealing with essential industry disputes.

From this very sketchy survey, it will be obvious that the essential industry dispute profoundly influenced our general labour legislation. This influence continued when compulsory conciliation procedures were engrafted

onto Wagner-style collective bargaining statutes beginning in 1943. As one commentator puts it:

> It is perhaps not going too far to say that in Canada every case that is not settled is treated as an emergency....32/

Thus, it has become part of the conventional wisdom of Canadian labour policy analysis that techniques of dispute settlement evolved to meet crises in essential industries may be highly inappropriate and unhelpful in the ordinary strike. With this thesis it is almost impossible to disagree. In particular, excessive familiarity with the conciliation board may have generated contempt for it and diminished its effectiveness as a technique of dispute settlement.

But, while our general labour policy has likely suffered as a result, there may have been one beneficial consequence of this tradition and familiar experience of government intervention. When intervention does take place in essential industry disputes it is not seen as unusual or anomalous. The ability of government to handle essential industry disputes through established institutions and conventional procedures may contribute to an atmosphere of normalcy in which settlement is made somewhat easier. For example, the appointment of a board of conciliation has the procedural effect of postponing a strike and the substantive effect of providing the public with a report that analyzes the issues and recommends a fair settlement. Assuming that this is a useful exercise (an assumption that will be examined below), we have a technique of dispute settlement that is widely accepted in Canada, but whose introduction in United States essential industry disputes is a matter of violent controversy. The difference between the two countries is, of course, the degree to which we have become accustomed to such intervention as a regular adjunct of collective bargaining.

On balance, however, this advantage gained from a half-century of I.D.I.A. policies is at best peripheral. There is at least as strong an argument that had the conciliation board not been promiscuously employed, it would have survived with greater potential for peacekeeping in a few, carefully selected, essential industries. In any event, with the advent of collective bargaining during World War II, the older policies and practices were properly called into question. If the I.D.I.A. has anything to contribute to the solution of present-day conflict, its continuing relevance must depend on a functional rather than an historical claim. The mere fact that essential industry disputes were viewed in a certain way in 1907 is no reason for treating them in a similar fashion six decades later.

C. Wartime Legislation: 1939-1948

The effect of the war on the essential industry disputes in Canada can initially be traced to the War Measures Act of 1914. 34/ However, the legal instruments that most directly affected wartime labour relations are the orders-in-council proclaimed under the authority of that statute.

Any assessment of these wartime regulations raises the same question presented by any discussion in this field: what is the scope and definition of an "essential" industry? Invariably war creates an atmosphere of crisis in which all industries are viewed as "essential" to the national war effort to a greater or lesser degree. On the other hand, even under wartime conditions one can envisage a certain normality in industrial relations. However, the "normal" relationships will embrace a narrower range of disputes than in peacetime, and the essentiality concept will be correspondingly broader.

Both types of disputes must be dealth with. First, the general body of wartime regulations developed to deal with industrial disputes in this period will be considered; then a few specific situations which amount to essential industry disputes in its more restricted sense will be reviewed.

In 1939, the federal government had not yet clearly adopted collective bargaining as a basic public policy or created any statutory mechanism for the determination of union bargaining rights. The major operative federal policy was that of strike postponement and compulsory conciliation which had been introduced over thirty years before in the 1907 Industrial Disputes Investigation Act. 35/ The coverage of this Act had been drastically inhibited by the decision in the Snider case, as has been seen, so that it in fact applied largely to transportation and communication and a few anomalous "federal" industries. However, with the outbreak of hostilities, the federal government was obliged to assume control of the economy for the effective prosecution of the war. P.C. 3495 was passed in 1939 (amended in 1941 by P.C. 1708) extending the coverage of the I.D.I.A. to industries involved in war production and to services "essential for the prosecution of the war or to the life of the community".

Yet this broadening of the coverage of federal legislation did not reach the basic controversy over the right to engage in collective bargaining. In an effort to ease industrial disruption created by this issue, P.C. 2685 was passed in 1940. It contained merely a declaration of policy favouring collective bargaining but provided no sanctions and had relatively little practical impact.

Although P.C. 2685 discouraged any interruption of work by strike or lockout, the order did no more than recommend the use of existing conciliation

procedures under the I.D.I.A., rather than provide any new devices. In 1943, the principles of P.C. 2685 and the provisions of the I.D.I.A. were both extended to Crown corporations (P.C. 10802), but again with little effect because of the absence of any compulsion requiring compliance with the principles. In 1941, P.C. 8821 made a strike vote a necessary prerequisite to a legal work stoppage. Finally, in 1944, following the recommendations of the National War Labour Board, P.C. 1003 was proclaimed, introducing measures that closed two of the most serious legal gaps that, even before the war, had contributed to much industrial strife. These were the twin obligations of management to recognize a union as the employees' bargaining agent and to bargain in good faith with the union.

Although all of these provisions represented innovations in government regulation of industrial relations, they can hardly be considered emergency measures, either in light of contemporary labour legislation or under the conditions spawned by war.

The war produced fewer drastic or unprecedented measures in industrial relations than might have been expected in view of the general emergency, at least in relation to strikes and lockouts. Many of the procedures adopted by order-in-council to deal with wartime industrial disputes had been developed in other jurisdictions and later became part of the general provisions of peacetime labour legislation in Canada.

Various explanations can be offered for the relative innocuousness of government regulation of industrial relations during the war emergency. Probably most significant is the extensive government control of issues generally left for settlement through industrial negotiations. Wages, prices, and conditions of labour were dictated by order-in-council and were thus eliminated

from the area of negotiation. The labour supply was rigidly controlled by setting up pools of workers to operate essential services, by re-directing workers required for vital industries, and by exempting certain individuals from military duty if their services were required elsewhere. Finally, in 1939, only 20% of the workers in industry were organized in trade unions.

The other side of the coin, involving that narrower range of true essential industries referred to above, provides a more fruitful study. The first of these essential industry disputes involved a strike by employees at the Hamilton plant of the National Steel Car Corporation in 1941. The parties had gone to conciliation but the refusal of management to comply with the interim report of the conciliation board pending a final report had resulted in a three-day work stoppage. The plant manufactured munitions and therefore fell under federal jurisdiction. The government, by P.C. 3040, appointed a controller to manage and carry on operations in the company's name; the strike was terminated and work resumed. 36/

A similar device was used in 1944 when employees of the Montreal Tramway Company went on strike following failure to reach agreement on a closed shop clause. The stoppage lasted ten days until two government controllers were appointed by P.C. 6416 to operate the system. Unlike the earlier order, it provided that the workers must return under the conditions of employment existing before the strike, although negotiations were to continue. Later, by P.C. 8211, the management of the company was vested in the controllers and the powers of the Board of Directors and the shareholders were suspended. 37/

A strike of steel workers in Ontario and Nova Scotia in 1943 produced a royal commission to inquire into wages within the industry. The findings resulted in P.C. 689 which established a basic wage throughout the industry. 38/

More drastic action, in the same year, was taken with respect to the coal industry. By P.C. 8021, strikes and lockouts were prohibited in that industry for the duration of the war. 39/

In conclusion, then, Canada's wartime experience was, paradoxically, more significant for its normalization of labour relations throughout the economy, under P.C. 1003, than it was for useful insights into the handling of essential industry disputes. As to the latter, it can only be said that across-the-board regulation of the economy minimized the anomaly of restricting collective bargaining in some industries while permitting freedom of economic action in others.

In 1948, the federal wartime regulations lapsed, a peacetime federal statute was enacted 40/, and the provinces re-entered the legislative arena.

D. Essential Industry Disputes Legislation Since 1948

With the repeal of the wartime labour regulations in 1948, the federal government enacted the Industrial Relations and Disputes Investigation Act (I.R.D.I.A.). 41/ This statute continued the policies initiated by the Ontario Collective Bargaining Act of 1943 42/, and by the 1944 federal regulations, P.C. 1003. 43/ Its basic themes are familiar, and are reflected in the provincial labour relations acts across Canada:

1. protection of the right to organize and to bargain collectively through trade unions;
2. creation of a duty of good faith bargaining;
3. compulsory conciliation as a condition precedent to strike and, impliedly, resort to the strike to resolve an impasse in negotiations;

4. compulsory arbitration of grievances over the interpretation or application of the collective agreement;
5. prohibition against strikes during the term of a collective agreement.

The recognition of the legitimacy of the strike as an adjunct to collective bargaining created for the first time a clash between two important public policies. On the one hand there was a commitment to freedom of economic action after compliance with conciliation procedures and on the other hand there was the traditional attempt to avoid disruption of key industries and services. To the extent that the latter policy was to be pursued, it was necessary to inhibit the freedom of action contemplated by the former.

In order to record and assess the extent to which contemporary Canadian policy represents a balance between these competing claims of freedom and public order and convenience, it is necessary to canvass legislative enactments relating to the settlement of labour disputes outside of the normal collective bargaining framework. In addition, there must be considered the impact of executive action beyond normal conciliation or post-conciliation peacekeeping procedures. Such executive action includes the appointment of royal commissions or industrial inquiry commissions, or the invocation of general emergency powers legislation to meet a labour crisis. Attention will be focused on three main factors: the industries affected, the machinery of dispute settlement, and the means by which the settlement machinery is to be triggered.

1. The Industries Affected

Table 3-1 shows, in summary form, those industries that have been the subject of special dispute settlement legislation. A full list of the relevant statutes is included in Appendix A.

As this table indicates, there is a general tendency to place policemen 44/ and firemen 45/ under special laws and a plurality of the provinces also attempt to prevent interruption of public utility services. 46/ Increasingly in recent years labour disputes in hospitals have been the subject of special legislation 47/ as have strikes involving railways 48/, shipping 49/ and ferry services. 50/ Rounding out the list of "public interest" situations, at least as evidenced by legislative intervention, are teachers 51/, and government employees 52/ (in some provinces) and—perhaps reflecting local economic and social idiosyncracies—loggers 53/ and liquor store employees. 54/

While the coverage of this legislation is generally couched in fairly specific terms, four provincial statutes deserve special consideration. Three western provinces, Alberta, Saskatchewan and Manitoba, prohibit strikes not simply because they occur in certain specified industries but because a work stoppage creates a risk to vital human or community interests. As will be seen, in 1968 British Columbia also elected to pass such a statute, albeit in very sophisticated form.

In Alberta, special settlement procedures may be invoked when in the view of the provincial cabinet,

> ...a state of emergency exists...in such circumstances that life or property would be in serious jeopardy by reason of (a) any breakdown or stoppage or impending

TABLE 3-1

INDUSTRIES SUBJECT TO SPECIAL LEGISLATION

TO POSTPONE OR PROHIBIT STRIKES

JURISDICTION

INDUSTRY	CANADA	ALBERTA	BRITISH COLUMBIA	MANITOBA	NEW BRUNSWICK	NEWFOUNDLAND	NOVA SCOTIA	ONTARIO	PRINCE EDWARD ISLAND	QUEBEC	SASKATCHEWAN
ELECTRICITY	-	X	X	X	-	-	O	X*	X*/O	X*/O	X
FERRIES	X*	-	X*	-	-	-	-	-	X*	X*/O	-
FIREMEN	-	X	X	X	-	-	-	X	X	X	X
GARBAGEMEN	-	-	-	-	-	-	-	-	-	X*/O	-
GAS	-	X	-	-	-	-	-	-	-	X*/O	X
HEAT	-	X	-	-	-	-	-	-	-	-	X
HOSPITAL	-	X	-	-	-	X	-	X	X	X*/O	X
PUBLIC SERVICE	X*	X	-	X	X	-	-	X	-	X*/O	-
POLICE	-	X	X	X	-	-	-	X	X	X	X
RAILWAY	X*	-	-	-	-	-	-	-	-	-	-
TEACHERS	-	-	X	X	-	-	-	-	-	X*/O	-
TELEPHONE	-	-	-	X	-	-	-	-	X*/O	X*/O	-
WATER	-	X	-	-	-	-	-	-	-	X*/O	X
GRAIN HANDLERS	X*	-	-	-	-	-	-	-	-	-	-
LIQUOR COMMISSION	-	-	-	X	-	-	O	-	-	-	-
LOGGERS	-	-	-	-	-	X*	-	-	-	-	-

SYMBOLS: X - Strike Prohibited O - Strike Postponed * - Legislation lapsed, repealed, or of limited application

> breakdown or stoppage of any system...furnishing or supplying water, heat, electricity or gas to the public, or (b) a stoppage or impending stoppage of hospital services... 55/

In Saskatchewan The Essential Services Emergency Act,1966, is virtually identical in its terminology except that it is directed towards any threat to "life, health or property". 56/ Manitoba, however, is prepared to impose a ban on any strike that threatens to interfere with

> ...uninterrupted operation of (a) business or functions ...essential to the health and well-being of the people of the province or some of them. 57/

The significance of these provisions, especially those of Manitoba, is that they vest a wide area of discretion in the provincial cabinet as to the circumstances under which a labour dispute is to be treated in a special fashion. Taking the statutes at face value it is possible, for example, to infer that some public utility or hospital disputes would not be considered to be crises. At the other extreme, it is also possible to envisage that in Manitoba almost any business or function covered by the section might be considered "essential...to the well-being of the people". Unless the term "well-being" is confined in its meaning to "physical well-being" by its juxtaposition with "health", any interference with important economic, social or even recreational activities 58/ might be brought under the statute. It is reasonably clear that any determination by the provincial cabinet to invoke the statute cannot be challenged; no court would attempt to review a factual determination by the Lieutenant-Governor in Council that a particular dispute is a crisis that requires the bringing into force of special settlement procedures.

This broad and unreviewable discretion is a two-edged sword. If exercised with restraint and objectivity, discretion is a useful technique for confining the "essential industry" label to only the most serious disputes, thereby leaving the practice of collective bargaining intact to the greatest possible degree. As well, the risk that the cabinet may invoke emergency procedures may itself be a spur to settlement, at least for the party who has superior bargaining power and who, therefore, has most to lose from a suspension of collective bargaining. However, if the cabinet reacts (as well it may) to public pressures to end a work stoppage, regardless of the actual existence of danger to persons or property, great unfairness may result. In effect, the weaker party's position may be retrieved and the stronger may be deprived of the anticipated fruits of its power. Since this alteration of the normal outcome of the dispute would likely occur after the conflict had been under way for some time, there would be considerable truth in the charge that "the rules were changed in the middle of the game". With this kind of accusation of favouritism and the resentment that would accompany it, the chance of voluntary settlement might be substantially reduced. A coerced settlement, as will be suggested, is not the soundest foundation for a fruitful labour-management relationship.

A different approach is found in the Quebec Labour Code, a statute of general application which embodies the familiar policies set forth at the beginning of this section. The Labour Code contains special provisions relating to "employees of a public service" 59/, a term exhaustively defined as follows:

(1) municipal and school corporations;
(2) hospitals, sanatoriums and institutions for the mentally ill;
(3) hospices; crèches and orphanages;

(4) universities, colleges and convents;
(5) telephone and telegraph concerns and boat, tramway, autobus or railway transportation concerns;
(6) concerns for the production, transportation, distribution or sale of gas, water or electricity and transportation services by delivery car operated under an authorization of the Transportation Board;
(7) garbage removal undertakings;
(8) the services of the Government of the province and other agencies of Her Majesty in the right of the Province, except the Quebec Liquor Board; 60/

While many more groups are brought within this definition than are caught by the statutes of the three western provinces, the consequences of their being so identified are much less serious. For such employees, the right to strike is maintained except to the extent that "a threatened or actual strike in a public service endangers the public health or safety...or interferes with the education of a group of students" 61/, in which case the strike may be postponed. The Quebec Civil Service Act 62/, complementing the Quebec Labour Code, places upon unions representing employees of the provincial government the obligation to make arrangements for the maintenance of "essential services" as a condition precedent to the right to strike. Power is also vested in a court to enjoin a strike of public service employees pending investigation by a fact-finding tribunal which has no power to make recommendations. 63/ The important distinction between Quebec and the other three provinces, however, is that the factual questions of whether an emergency exists and whether adequate provisions have been made for the preservation of essential services have not been left with the cabinet. The former question is to be impartially decided by the court, while the latter is left to the labour relations board.

To a large extent, this arrangement answers the objections to the exercise of unreviewable cabinet discretion. However, the Quebec scheme is still subject to one significant drawback: these factual determinations are made

in the midst of a conflict when dispassionate analysis is made doubly difficult by the need for a speedy decision and by the risk that evidence will be distorted to obtain the tactical advantages of a favourable ruling.

The federal Public Service Staff Relations Act 64/ may well provide the soundest method of identifying situations in which the general right to strike should be suspended. Upon obtaining bargaining rights for federal public servants, a union is entitled to elect whether it wishes to have future collective bargaining disputes settled by arbitration or by a process of conciliation and, impliedly, by a strike. It is obvious that in the event that the union selects the former alternative, no problems of essential service strikes can arise: all strikes are by definition unlawful. However, in those bargaining units where a union chooses the strike option, the Public Service Staff Relations Board, an impartial administrative tribunal, must designate prior to conciliation those employees or classes of employees "whose duties consist in whole or in part of duties the performance of which...is or will be necessary in the interest of the safety or security of the public". 66/ No employee who is so designated is permitted to strike. 67/ By this procedure, "essentiality" is established well in advance of bargaining and, presumably, as the result of careful inquiry and reflection by the Board. It is possible, of course, that practical problems may arise that will undermine the scheme. For example, so many employees in a unit may be "designated" that the impact of a strike by those remaining would be negligible. Again, it may be discovered during a strike that the Board has overestimated or underestimated the number of employees needed to maintain essential services. But these risks are conjectural at the present time and only experience under the statute will prove whether the scheme is a viable one.

All of the legislation discussed thus far is labour legislation specifically designed to grapple with the problem of essential industry disputes, either by a careful statutory specification of those industries considered essential or by delegation of that task to cabinet, court, or board. However, there have been a number of instances in which governments have used general emergency legislation to intervene in labour disputes.

As has been seen, on several occasions during the war the federal government exercised its powers under the War Measures Act to seize an industry or service deemed essential in order to end a labour dispute that was impeding the war effort. In the postwar period such action has been rare but not unknown. At the federal level, a prolonged strike of grain-handlers in 1953 was ended in this manner when an order-in-council was passed under the Emergency Powers Act 68/, the peacetime successor of the War Measures Act.

While the federal government has been loath to follow this precedent, apparently preferring to enact ad hoc seizure legislation when necessary 69/, the provinces have increasingly begun to experiment with the use of this technique. In British Columbia, the government invoked the Civil Defence Act 70/ to end a strike of seamen employed on a vital ferry service in 1958, as did the government of Prince Edward Island 71/ in 1966. In Quebec, general legislation was used in the same year to end a strike of hospital employees by imposing government control on the management of the institutions affected. 72/ As well, an emendment was passed to the Transportation Board Act 73/, general in its terms if not in its operation, that enabled the government to assume control of the strikebound Levis ferry.

In this connection, also, a comparison should be made for analytical purposes with the 1967 Quebec legislation that ended a prolonged teachers'

strike and displaced the autonomy of local school boards in the realm of collective bargaining. 74/ While the ferries and hospitals were brought under general non-labour legislation, the schools were the subject of ad hoc legislation directed specifically to the settlement of the labour dispute. While the former statutes were necessarily crude in their impact on the strike—in effect there was a simple back-to-work order—the Quebec schools statute provided an elaborate plan for settlement of both the existing and future controversies. On the other hand, the British Columbia and Prince Edward Island experiences do seem to indicate that governments have residual powers which are available to meet any genuine emergency. If the most desirable way to handle essential industry disputes is to permit them to run their course, then perhaps no further legislation is needed because the means are already available to prevent actual disaster. However, in a search for predictability, fairness and freedom from political pressures, the use of general emergency legislation should be avoided.

When one considers all of the industries affected by these various statutory measures, it is clear that if "essentiality" is to be measured by legislative concern, the concept is a narrow one. Moreover, it does not cut to the core of the labour force. Except for the loggers, whose violent strike was alleged to have jeopardized the basic economy of the province of Newfoundland, all groups of employees affected by legislation were involved in industries that were publicly-owned or subsidized or that enjoyed a publicly-granted monopoly. Moreover, with the possible added exception of liquor stores, the services provided actually were related to the physical health and safety of the community or to the maintenance of communications. It is perhaps surprising that the flow of persons and goods by rail should be more zealously protected by legislators than their transportation by air, water

or truck, but perhaps the special facts of Canada's geography and economy warrant the special concern that has been shown for railway labour disputes. 75/ Of this, more below.

One final area of special legislative concern has been the regulation of picketing of industries or services that might be characterized as "essential".

The broadest reach of any such legislation is found in a 1959 amendment to The Constitution Act 76/ of British Columbia which simply outlawed any picketing of provincial government buildings designed to procure a strike of civil servants. The statute was enacted in the midst of such a strike and effectively terminated it, although a court had a few days earlier granted an injunction against such picketing without any statutory authority. 77/ The statute does not distinguish between essential and non-essential governmental operations but the inference to be drawn from this drastic measure is that all government operations are thought to be essential.

On the other hand, Ontario and British Columbia have also passed statutes that do not appear to establish substantive rules against picketing of essential services and industries—these continue to come under the general law—but rather provide special procedural rules for obtaining injunctions. In both provinces, the courts are generally forbidden to issue ex parte injunctions, but are permitted to do so in Ontario when a labour dispute results in "a breach of the peace...or interruption of an essential public service" 78/, and in British Columbia "to safeguard public order". 79/ Since both of these statutes were passed in response to complaints against excessive use of ex parte injunctions, it seems reasonably clear that the legislators intended simply to leave unaffected whatever jurisdiction the

courts formerly had in these situations, rather than to confer new powers upon them. It is an open question, however, as to whether the courts might seize upon the language of the Ontario statute as an independent basis for issuing injunctions, even if no other violation of the law is shown.

In terms of the potential coverage of these statutes, it must be emphasized that they are primarily directed towards picketing, although the Ontario statute might be construed more broadly. Moreover, these statutes are open-ended in the sense that they are potentially applicable to any industry should a court decide that it falls within the legislative language.

Apart from formal legislative recognition of a public interest in the continued operation of certain industries, there have been a number of recent cases in which dramatic executive action, similarly motivated, has forestalled or ended a strike. Several of these cases involved industries already mentioned—railways 80/, hospitals 81/, and shipping 82/—but the list might be extended to include longshoremen 83/, postal employees 84/, and provincial civil servants. 85/ In each case, a royal commission, or less formal industrial inquiry commission, was appointed to investigate the dispute, although not necessarily empowered to settle it.

Beyond this point, documentation becomes difficult and the line between significant and merely routine intervention blurs. In a number of transportation disputes—for example, in airlines, long-distance trucking and local transit systems—active and intensive mediation has been reinforced by veiled or blatant threats of special legislation to end the strike. Major disputes in a Manitoba packinghouse and in the west coast fishing industry led to the appointment, respectively, of a royal commission 86/ and a federal-provincial committee of inquiry 87/ as part of a long-term exercise in peacekeeping.

Violence and community disruption probably account for the special concern of government in strikes of dump-truck operators and construction workers in Toronto, both of which also gave birth to well-known royal commissions. 88/ Indeed, royal commissions and industrial inquiries have been so frequently used as a means of "cooling-off" bitter strikes that their appointment is of diminishing significance as an accurate benchmark of the public interest. Finally, if high-level official intervention in the bargaining process is itself a sign of the essentiality of the industry or service, there is hardly an industry that has escaped the distinction of community concern: newspapers, hotels, television broadcasting, steel manufacturing and oil refining, textile mills and furniture factories, racetracks and breweries; all of these and others, have been deemed worthy of ministerial intervention in recent years.

This survey of the industries affected by special legislative or executive intervention leads to one of two conclusions: either such intervention is no indication of essentiality at all, or the concept has been so promiscuously applied as to be useless as a means of identifying a special area of concern. To add to this rather melancholy assessment, it must be remembered that no attempt has been made to probe situations in which disputes were simply permitted to run their course without any type of extraordinary peacekeeping procedure having been resorted to. How many of these disputes really touched essential community interests is impossible to determine, first because we have no precise definition of essentiality and, second, because we know so little about the impact of strikes.

The argument can thus be made that today all disputes, to a greater or lesser degree, are treated as if they involved essential services and industries. The turn-of-the-century resort to conciliation was intended to be

more restricted, but the post-1945 passion for informal intervention, fact-finding and legislative regulation injected the state into virtually all labour conflicts. Thus, Canadian labour relations policy is ambivalent, if not schizophrenic. A laissez-faire philosophy, borrowed from the United States Wagner Act, assumes that collective bargaining and sweet reason will conquer all. But when serious conflict occasionally breaks out, the policy of allowing the parties to settle their differences is petulantly repudiated and government returns to its historic pursuit of that holy grail, industrial peace.

This pattern has a dynamic of its own, which further complicates the task of defining essential industry disputes. Each interventionist episode is used as a precedent to justify further intervention: if railroaders labour in the public interest, why not longshoremen and seamen and workers in wheat storage facilities? If the production of electrical power is essential to the community, why not its distribution or the production and distribution of natural gas or petroleum products? If the uninterrupted flow of goods is a matter of public concern, why not the uninterrupted flow of news and advertising on radio and television and in the daily newspapers?

In summary, an initial decision that a particular industry is essential tends to be self-confirming and self-reproducing. Intervention becomes a way of life: the very fact of past intervention is presented as evidence that the essential community interests are involved and can only be protected by further intervention.

2. The Machinery of Dispute Settlement

If "essentiality" has apparently become a pervasive characteristic of Canadian labour disputes, its impact has not been uniform throughout various sectors of industrial relations. Some clue to the extent to which there is (or is thought to be) genuine "essentiality" is the type of dispute settlement machinery invoked to forestall or end the dispute.

Such legislation as is now in force in Canada has been canvassed in Appendix B and ranked to reflect the extent of interference with the collective bargaining process and with the use of economic power. The most extreme departure from "pure" collective bargaining involves denial of the right to strike and its replacement by compulsory arbitration or binding mediation. At the other end of the scale there is the normal conciliation procedure, perhaps coupled with restrictions on picketing. The extent of tolerance for the use of economic power, then, reflects the belief that the community can, or cannot, accept an interruption of service or production.

Starting with the assumption that the use of the strike or lockout is normal and acceptable (though not desirable), what peacekeeping devices have been employed and to what degree do they represent a departure from the norm?

The general pattern of Canadian labour relations legislation, as has been noted, is to superimpose upon the process of collective bargaining an obligation to resort to conciliation. Until conciliation procedures have been exhausted, in most jurisdictions, there can be neither strikes nor lockouts. 89/ This legislation applies to emergency disputes as to all others, except to the extent that special statutes substitute a different arrangement. Indeed, the emergency dispute was the archetypal situation in which

Canadian legislation was designed to operate: as has been seen, the first federal law was designed for railways, public utilities and coal mines. To this extent, then, all disputes are regularly the subject of peacekeeping efforts. However, the conciliation process does take on certain special characteristics in situations where a more intense public concern is felt to exist.

In its pristine form 90/, the conciliation process operated in two stages. A conciliation officer, employed by the Department of Labour, would meet with the parties and attempt to persuade them to settle their differences. If he failed to secure a settlement, he would so advise the Minister of Labour who was empowered to (and almost invariably did) establish a tripartite board of conciliation. The board was armed with sweeping powers to compel the production of documents and the giving of evidence 91/, and tended to follow court-like procedures. But its ostensible function was to propound a formula for compromise. If peacekeeping efforts failed, the board would report to the Minister and recommend appropriate terms of settlement. 92/ This report, implicitly or explicitly, would identify the party whose unreasonableness, presumably, had frustrated agreement. Public opinion could then be mobilized in favour of the board's proposals and pressure would mount for settlement on the terms recommended. The board thus was designed to perform a normative function—in effect, non-binding adjudication—which was often inconsistent with its peacekeeping mission.

The inconsistency of these two roles is easily illustrated. An important technique of peacekeeping is to avoid confrontation; by keeping the parties apart and in ignorance of each other's position, a skilled conciliator may gradually persuade them to move towards common ground. However, adversary-

style proceedings have the effect of highlighting issues in dispute and of forcing the parties to articulate clearly opposing viewpoints. Similarly a good conciliator who has not succeeded in bringing the parties together on all issues will wish to avoid doing anything which might inhibit compromise at a later date. By contrast, a conciliation report designed to secure adherence to recommended norms through the pressure of public opinion may freeze negotiating positions that were actually fluid or may bolster the determination of the favoured party to refuse further concessions, even though these might be useful and essential to a negotiated settlement. Finally, the norm-setting conciliator is operating under the twin handicaps that a particular set of contract terms is often rationally indefensible, although conducive to settlement, and that the public understands little and cares less about the controversy between the two parties to the dispute. A report, therefore, often did little to produce pressures for settlement and sometimes actually served to exacerbate the situation.

In the 1950's and 1960's, a subtle change has taken place in general Canadian conciliation techniques. Much more emphasis has come to be placed on the accommodative rather than the adjudicative functions of conciliators 93/, with the result that the use of the formal, tripartite board has declined. 94/ With this decline, the board report is less frequently used as a technique of pressuring the parties to agree to a settlement. But, while this change has generally helped to increase the effectiveness of conciliation, the special setting of essential industry disputes creates a rationale for preserving old-style normative conciliation in this area of conflict.

While it is generally conceded that the postponement of conflict is not itself conducive to settlement, in essential industry disputes no government wishes to expose itself to the charge that it has failed to do everything

within its power to keep the peace. Therefore, while conciliation generally is used more selectively throughout the economy, it is virtually automatic in essential industry disputes. Too frequent use may undermine the efficacy of even the best-designed system, for it has long been observed that when conciliation is automatic, direct bargaining tends to become a mere rehearsal for it, especially since a normative report is so often framed as a compromise between two apparently irreconcilable positions. Similarly, since post-conciliation government intervention (whether by informal mediation or formal arbitration) has become a fairly familiar feature of Canadian essential industry disputes, there is a risk that conciliation itself may become a prelude to such intervention rather than a fruitful search for compromise. While the public is uninformed and unconcerned about the mill-run of disputes, a work stoppage in transportation, communications, or public utilities immediately engages the attention and concern of the whole community. Even conceding the limits within which the community can pressure either of the parties, a conciliation report may come closer to serving its original function of mobilizing public opinion in these situations than in the generality of cases. Finally, where the industry or service affected is a private or public monopoly, any wage increase is almost sure to generate pressures for price or rate increases or for tax subsidies. The public, therefore, has a more direct and easily identifiable interest in the substantive terms of any bargain and will naturally wish to measure the positions of the parties against the yardstick of a conciliation board report.

All of these factors operating in the essential industry dispute may tend to maximize the formality of the conciliation board's proceedings and its report and thus, if general experience is any criterion, to minimize its effectiveness in avoiding strikes. To the extent that conflict is less

effectively resolved through the regular conciliation procedures, there are created further temptations to invoke special measures rather than accept the consequences of a work stoppage.

Informal mediation by senior government officials is the most common post-conciliation step and the one closest to the mainstream of collective bargaining. At a minimum, the prestige of a special mediator may be used to gain the confidence of the parties and to give new momentum to settlement discussions. Beyond this, a recalcitrant union may be persuaded to sign an agreement by the promise of government to investigate its just complaints 95/ or an employer moved from a fixed negotiating position by the promise of a subsidy or rate increase. 96/ If persuasion fails, threats may prevail, threats to impose a solution by law 97/ or to seize the enterprise. 98/ These mediation efforts, conducted with varying degrees of subtlety and sophistication, undoubtedly produce many settlements. However, as with conciliation itself, too frequent peacekeeping efforts at the highest level tend ultimately to be self-defeating. The prestige of a cabinet-level mediator, which should be a catalyst to negotiation, is often diluted by his pursuit of the political advantages of having "sold" a settlement; his threats and promises, if not fulfilled, tend thereafter to become less credible.

Some few attempts have been made to institutionalize high-level mediation. In Nova Scotia, for example, employees of the provincial power and liquor commissions are permitted to strike but their right to do so is postponed for a thirty-day period following conciliation 99/, presumably to permit further mediation efforts. In Prince Edward Island, following conciliation, parties to a labour dispute affecting a public utility must submit to a formal hearing by the Public Utilities Commission; strikes are postponed until fifteen days after the issuance of its non-binding report. 100/ Quebec

legislation provides postponement for up to eighty days of strikes that may endanger the public health or safety, pending fact-finding by an ad hoc board of inquiry. 101/

Special legislation has been passed on occasion to extend the term of an expired collective agreement and thus to create a period within which negotiations (and presumably mediation) might be resumed. In 1960, a federal statute ordered railway strikers to return to work and postponed the resumption of the strike for a period of six months. 102/ While no formal settlement mechanism was created and the parties succeeded in reaching an agreement during this period, it is obvious that the threat of an imposed solution must have been in the minds of the negotiators. Similarly, a Newfoundland statute 103/ in 1967 required hospital workers to end their strike but created no mechanism for the resolution of the dispute. However, an informal, non-statutory promise of arbitration was made if further negotiation proved fruitless. A 1967 Quebec statute 104/, to which reference has already been made, was much more elaborate. It ended a prolonged teachers' strike, revived a number of collective agreements that had expired, extended their duration for approximately one year and specified wage increases to be paid by the school board employers. As well, specific provision was made for province-wide negotiation of the next, and all succeeding, collective agreements, in aid of which a special fact-finding body was to be established. The coercive power of the state, merely hinted at in the passage of the 1960 federal railway legislation, is unmistakeably announced in the Quebec statute. In fact, it provides that future wage disputes may be submitted to binding arbitration by either party or by the Minister of Labour.

The Quebec statute represents the convergence of two techniques by which peacekeeping has been translated from an exercise in persuasion into a

committment to compulsion. It illustrates both the direct control by the government over the conduct of one party to a public interest dispute and the creation of an obligation to resort to a specified method of dispute settlement other than the strike.

The technique of seizure, which does not in and of itself terminate a strike, has seldom been employed in Canada in peacetime. Strictly speaking, of course, the Quebec school legislation did not remove control of the schools from local boards of education but, in fact, they were required to grant the increases provided in the statute and their autonomy as negotiating bodies was clearly ended. Henceforth, the provincial government can be expected to exercise a decisive influence in teacher negotiations. Clearer examples of the use of the seizure technique were two other Quebec situations. In one, a government trustee was appointed under the Hospitals Act 105/ to administer almost half of the province's hospitals in order to end a three week strike; a settlement was negotiated and the hospitals were then returned to local management. In the other, an administrator was appointed, under an amendment to the Transportation Board Act 106/, to assume control of a private ferry company and to settle a strike that had interrupted service.

The only other instances in which seizure was used as a technique of ending a strike were at the federal level. 107/ In one case in 1954, referred to earlier in this chapter, the federal government used its general emergency powers to seize grain elevators. 108/ Once in control, the government was able to negotiate a settlement with striking grain-handlers. A second case, in 1958, involved a strike of seamen serving on a coastal ferry in British Columbia. Special federal legislation 109/ was passed providing an interim wage settlement and vesting control of the ferry line in a goverment-designated administrator who was empowered to operate it and to negotiate a

settlement. The statute also provided for the resumption of collective bargaining and, needlessly as matters turned out, for compulsory arbitration.

If seizure of the enterprise is an unfamiliar technique, two statutes must be virtually unique in the annals of North American labour legislation. In both of these statutes, the government in effect "seized" the union rather than the employer. Newfoundland in 1959 passed ad hoc legislation 110/ that dissolved two union locals in order to halt a bitter woods strike. Only in Newfoundland could a strike of loggers conceivably be termed an "emergency", but in terms of local political realities there can be no doubt that the domestic tranquility of the island province was shattered. The legislation was greeted with derision in the rest of the country but it escaped constitutional challenge, served its purpose, and was in due course partially repealed. 111/ Of greater significance was the 1963 federal legislation 112/ imposing trusteeship on five unions representing seamen on the Great Lakes. The statute was designed to end the disruption of shipping that had been produced by inter-union rivalry rooted in the labour movement's desire to "free" seamen from the allegedly corrupt Seafarers' International Union. This disruption was the subject of an extensive inquiry 113/, fierce public debate and behind-the-scenes negotiation in government and union circles. When all else failed, a board of three trustees assumed management of all unions operating on the Great Lakes, foremost amongst which was the Seafarers'. After almost five years of operation, the trustees relinquished control to presumably reformed and duly elected union officers.

It is a telling comment on the state of civil liberties in Canada that virtually no legal basis existed for challenging either statute on the grounds of interference with freedom of association. 114/ However, viewed purely as an exercise in the expedient settlement of public interest disputes, "seizure" of the union can hardly be surpassed.

Turning next to the conventional methods of substituting some technique of dispute settlement for the strike as the terminal point in collective bargaining, there have been a few Canadian legislative experiments with "mediation to a finality", to use a term popularized by the United States Secretary of Labor, W. Willard Wirtz. An early version of the Prince Edward Island legislation gave the Public Utilities Commission power to review the recommendations of a conciliation board report in any dispute involving a utility and to impose its recommendations upon the parties with or without change 115/, and in Manitoba the Cabinet has the power to confirm or vary, and make binding, the award of a mediator in disputes affecting public utilities, liquor commission and provincial government employees. 116/ Prior to 1968, binding mediation was likewise provided in British Columbia to resolve collective bargaining impasses involving employees of the public hydro-electric system 117/ and of municipal police and fire departments. 118/ With the passage of the Mediation Commission Act of 1968, this device was extended to a broad range of public interest disputes. 119/ Finally, binding mediation is provided for wage disputes in the Alberta public service. 120/ Obviously, in each case "finality" is secured by a prohibition against strikes. Actual experience under these statutes has been negligible 121/ and no published accounts exist of their use.

Choice-of-procedures legislation, widely advocated in the United States, is represented on the Canadian statute books by one bizarre, but apparently moribund, enactment. An Alberta statute provides that "where at any time in the opinion of [the cabinet] a state of emergency exists...in such circumstances that life or property would be in serious jeopardy" by reason of a labour dispute affecting hospital or public utility employees, a proclamation may be issued that renders further strike action illegal and authorizes the

Minister of Labour to "forthwith establish a procedure to assist the parties to the dispute". 122/ The breathtaking open-endedness of the statute may well have been a deterrent to its use, as the timing and method of intervention is left completly in the hands of the executive and subject to neither legislative prescription nor judicial review.

By far, the most common substitute for the strike is arbitration. Parties to any collective bargaining relationship may, of course, voluntarily submit their negotiating disputes to third-party adjudication, but seldom do so. 123/ The two prominent exceptions to this aversion to arbitration are unions of policemen and firefighters whose constitutions frequently contain a no-strike pledge. Their self-denying ordinances are recognized in several provincial statutes 124/ that provide for binding arbitration only for those unions which are committed to a policy of settling disputes without stoppage of work.

Usually, however, provincial statutes provide for compulsory arbitration for police and fire department employees 125/ and with increasing frequency for hospitals 126/ and public utilities workers 127/ and teachers. 128/ Federal ad hoc legislation has twice compelled the arbitration of railway disputes 129/ and the probabilities are great that future bargaining impasses on the railways (and perhaps airlines) will be similarly resolved.

Two compulsory arbitration statutes are deserving of special scrutiny. The first of these, the Ontario Hospital Labour Disputes Arbitration Act, 1965 130/, will be examined in very considerable detail in a subsequent section. Suffice it to say, at this point, that the statute appears to be working tolerably well despite a major shortcoming: the failure to provide arbitrators with either criteria for judgment or reliable statistical data

beyond that which the parties adduce or the board can gather by its own initiative. 131/

It is in relation to these two matters that the new federal Public Service Staff Relations Act 132/ can be considered model legislation. Upon certification, a bargaining agent representing public employees is obliged to elect between arbitration and strike as the method it proposes to pursue for the resolution of negotiation disputes with the government. 133/ Subject only to the nnion's right to re-elect 134/ and to the designation of non-striking "essential" employees 135/, it is this voluntary surrender of the right to strike that creates the binding obligation to arbitrate. But if resort to arbitration is a matter of free choice, it has been made an attractive one. Instead of entrusting arbitration to a series of ad hoc boards, a permanent independent tripartite Arbitration Tribunal was established. Its permanence was viewed as some assurance that "it would be able in time to gain a deep understanding of the Public Service", to develop "some measure of continuity in the standards...on which arbitral awards are based", and to gain "the respect and confidence upon which the success of the whole system will ultimately depend". 136/ Moreover, instead of simply instructing the arbitrators to "examine into and decide on matters that are in dispute" (as does the Ontario hospital statute) 137/ the federal Act carefully specifies the criteria for decision-making. 138/ Equally important, the respected (and non-partisan) Pay Research Bureau was placed under the administrative aegis of the Public Service Staff Relations Board to provide accurate statistical data both to the parties and to the Arbitration Tribunal. This innovation should greatly enhance the quality of both argument and decision-making.

A few general observations can be made about this whole mass of legislation. First, compulsory arbitration and binding mediation are becoming more common, especially in industries that are said to be essential, such as railways and public utilities. However, there has been little attempt to evaluate the impact of compulsory arbitration on the collective bargaining process. The account of experience under the Ontario Hospital Labour Disputes Arbitration Act, 1965, infra, is designed to provide a factual basis for such an evaluation. Second, there are signs of increasing sophistication in legislative solutions to essential industry disputes; the Quebec education statute and the federal public service statute are both attempts to produce a bargaining framework that will be conducive to peaceful settlement of disputes, even though the former is characterized by a high initial degree of compulsion. In this connection, a recent proposal for dispute settlement procedures for New Brunswick public service employees deserves close scrutiny. 139/ The new British Columbia Mediation Commission Act, discussed below, is likewise sophisticated legislation. Third, there has been almost no attempt to use the widely-advocated choice-of-procedures approach in Canada except to the extent that ad hoc statutes are written to suit the occasion for which they are passed. Fourth, as will be seen, there has been a tendency to pass legislation in moments of crisis. When the crisis is over, the legislation either expires by its own terms or remains on the statute books without being reviewed in the light of more dispassionate analysis. Fifth, without resorting to special labour legislation, governments have available to them substantial powers to safeguard the nation or province against genuine disaster: emergency powers legislation, appointment of royal commissions and industrial inquiry commissions, control over hospitals (as in Quebec) or over striking public servants by threats of dismissal, or by common law injunction (as in British Columbia).

But perhaps the most important point that emerges from this analysis of legislation is the degree to which non-coercive measures continue to be relied upon in most essential services and industries. Recently coercive legislation has been increasing, no doubt, but most disputes continue to be amenable to settlement through the collective bargaining process. Whether this is the result of public spiritedness on the part of negotiators or a reminder that the parties, as well as the public, suffer inconvenience and loss during a strike, does not really matter. What is significant in terms of the future course of public policy is that there is relatively little in our past experience to show that new anti-strike laws are the best or only way to deal with essential industry disputes.

3. Invoking Dispute Settlement Machinery

An important feature of any essential industry dispute legislation is the means by which it can be brought into play. As will be seen, it is frequently urged that any settlement machinery that comes into play automatically will have an adverse effect on bargaining. The knowledge that arbitration lies ahead, for example, will become part of the tactical calculus of negotiation. Parties will tend to avoid making concessions, and maintain polar positions, so that they will not be prejudiced when the arbitrator reaches an award mid-way between the two positions. Thus, flexibility and unpredictability of result are often urged as objectives of any legislation that is designed to avoid strikes while still retaining collective bargaining.

There seems to be an iron law of emergency disputes. As two United States commentators have stated:

> If the parties are not faced with the consequences of refusing to settle, their desire, determination or even ability to settle dwindles. This has occurred under each and every law or procedure, federal and state, legal and extralegal, which has been in existence. No strike control law or extralegal method has succeeded in avoiding this pitfall.... Emergency disputes thus create their own rationale. Behavior becomes tailored to the laws. The more laws enacted, the more "emergencies" are created, and the more "necessary" become the laws. 140/

If this pessimistic conclusion is justified, there may be a temptation to finesse the whole fruitless exercise by simply stipulating what consequences will result from a breakdown in bargaining. To yield to this temptation may be to abandon collective bargaining; this at least is the theoretical implication of doing so. Yet Canadian legislators have frequently chosen this approach. From this it can be inferred either that there is insufficient understanding of the need to preserve flexibility or a conviction that collective bargaining is not a high priority objective, at least when ranked against the maintenance of service in essential industries.

Appendix C shows the methods of invoking legislation designed to postpone, prohibit or end strikes. Virtually half of the statutes analyzed provided a series of inexorable steps in the process of dispute settlement, mostly culminating in binding arbitration or mediation. The only variable, in some cases, is the discretion of the Minister of Labour as to whether or not to appoint a board of conciliation in the event the parties are unable to conclude an agreement in direct negotiations or with the aid of a conciliation officer. Even this element of unpredictability is absent in a number of instances where the appointment of a board is either virtually automatic 141/ or has been written out of the Act in practice by the Minister's fixed policy of refusing to appoint one. 142/

However, there are a number of situations in which the parties are, or were, kept in a state of uncertainty as to which of several strike-ending techniques (if any) would be invoked and at what stage in the dispute.

At least in theory, the greatest elements of uncertainty and flexibility are preserved when there is no legislation on the books when bargaining begins but where the legislature acts to break an impasse after bargaining has broken down. Under these circumstances, the legislature has complete freedom to fashion statutory devices appropriate to the situation and, by making them operative for a single dispute only, to minimize the debilitating effects of this legislation on future bargaining in the industry.

The federal government has used this technique six times since the war: twice to order a return to work pending binding arbitration 143/, once to postpone a strike for six months 144/, once to effect seizure of the struck enterprise 145/, once to place unions in trusteeship 146/, and once to implement specific working conditions that had been the source of controversy. 147/ This indicates the wide range of possibilities open to a government when this device is employed. Moreover, the very threat to resort to legislation may have a catalytic effect on the parties' search for private means of settlement. This happened, for example, in 1954 when the railway unions and their employers "agreed" to arbitration in the face of a government promise to impose it by force of law.

While this device of ad hoc legislation has received the benediction of at least one United States expert 148/, it is certainly not without its special disadvantages.

Most obviously, the legislative machinery moves slowly. Unless the union is obliging enough to strike while the legislature is sitting, it must be summoned and its cumbersome rites observed. 149/ If there is political capital to be made from harassing the government or from delaying the passage of legislation, the opposition is presented with a golden opportunity. Equally, a government reluctant to intervene can plead that its hands are tied by the absence of existing legislation and the difficulties of passing new legislation. Finally, on this point, a government that brings in legislation to settle a dispute which is already under way is open to two charges, both of which may damage it politically: critics of the government could condemn it for allowing the situation to degenerate to the point where special measures are needed, and the parties to the dispute could protest against an ex post facto law. All of these factors must give pause to any government considering emergency legislation to meet a particular crisis.

Paradoxically, the very existence of fixed and specific procedures for the settlement of essential industry disputes tends to operate in the same way as the absence of such procedures, to insulate the government against demands for improvised ad hoc intervention. Where legislation has already been passed that deals with disputes in a particular way, to the extent that it is effective, it will alleviate the pressure for further intervention. As well, to superimpose special strike-ending measures upon established settlement procedures in a particular case would appear to be especially unfair to the party (usually the union) which has the initiative in the situation.

We turn next to the most common technique of invoking settlement procedures—standing legislation. This term is intended to embrace statutorily defined procedures that are designed to come into play more or less automatically on the happening of specified events.

Two advantages are claimed for this type of legislation. First, it is easy to invoke. There is no need to improvise in moments of crisis and, unlike ad hoc legislation, the notion that government is siding with one of the disputants in a current controversy is avoided. Second, it is relatively easy to administer. Well-designed permanent structures for resolving interest disputes can be constructed 150/ or an approach can be developed through the repeated handling of like problems by a series of boards. 151/ This permanence, or body of precedent, is a likely feature of any pre-established dispute settlement procedure; it undoubtedly tends in the direction of "judicialized" rather than negotiated settlements. A decision to establish standing procedures may therefore be a decision to risk the future of collective bargaining in the industry. On the other hand, the decision to abolish strikes may have been consciously taken as a policy matter and the standing procedure designed as the alternative that would produce the fairest result for the parties in the circumstances.

Critics of standing procedures answer each of these points. As to ease of invocation, they maintain that this very fact will encourage the parties to avoid the responsibility of settling their differences through negotiation. Underlying this criticism, of course, is the premise that collective bargaining is basic public policy to be pursued whenever possible. As to ease of administration, the critics make much the same argument. If the experience of settling a dispute through binding arbitration or mediation proves too pleasant, it is argued, the parties will have no incentive to avoid the experience.

Some attempt is made to find a compromise between these two positions by creating a situation of uncertainty while the parties are bargaining which is resolved only when it becomes clear that they have failed to reach agreement.

Whether a strike is to be permitted in a given dispute remains an open question until some governmental agency or officer makes a deliberate decision to invoke settlement procedures. Thus, in every potential conflict situation the parties are to be confronted, at least in theory, with two possibilities--strike or binding arbitration (or mediation). This choice is broadened in a few statutes to include an infinite range of possible settlement techniques 152/, seizure 153/ or postponement of the strike pending fact-finding. 154/

But assuming that a choice-of-procedures approach is desirable, who is to make the choice? It has been urged that settlement of essential industry disputes be "depoliticalized" 155/ — that government should be insulated from political pressures to intervene which are so often irresistible. One device available to provide a buffer against such pressure is to assign the decision to intervene to an independent (and expert) administrative tribunal. Of course, when government itself is one of the disputants it should not, in fairness, be entitled to select the means of dispute settlement. It is therefore not surprising that the two statutes 156/ that give an independent labour relations board some limited role in dispute settlement should both affect public employment. In each case the board is empowered to decide whether adequate arrangements have been made during a strike for the maintenance of essential services. In a third statute 157/, a conciliation officer is empowered to invoke binding mediation if he is unable to effect a negotiated settlement of the dispute. As an employee of the Department of Labour, his freedom from political pressure is obviously less than that of a labour relations board.

However, the usual pattern is to vest in the cabinet, or in a particular minister, power to set in motion whatever settlement machinery the

statute provides. This is a two-edged sword. On the one hand, it might be said that government is being forced to accept its public responsibilities in what is properly a matter of public concern: stoppage of an essential industry or service. The decision to suspend the right to strike should not be lightly made nor should it be sloughed off on a body that, however expert, is not politically accountable. On the other hand, few cabinets or ministers are capable of resisting the temptation to take the politically expedient course. Even where labour is reasonably strong politically, there will almost always be considerable community support for measures outlawing at least essential industry strikes. 158/

There is some risk, then, that governments will exercise too little restraint in the invocation of settlement machinery, with the result that the parties may come to believe that intervention is inevitable and bargaining pointless. There is insufficient recorded experience with Canadian legislation to either support or disprove this hypothesis. However, the virtual absence of experience in either Alberta and Manitoba, both of which have statutes 159/ that would seem to invite intervention, might be taken as evidence that there is no need for undue concern.

E. The Ontario Hospital Labour Disputes Arbitration Act, 1965

One of the most widely advocated solutions for the problem of essential industry disputes is that they should be submitted to final and binding arbitration. The advocates of compulsory arbitration tend to be laymen while those professing expertise in the field remain skeptical. What are the lessons of actual experience with compulsory arbitration?

One of the most carefully constructed Canadian experiments in arbitration in essential industries is The Hospital Labour Disputes Arbitration Act, 1965 of Ontario. 160/ Police and firemen, of course, have had long experience

with arbitration 161/ but special traditions and paramilitary organization make these groups inappropriate as a model. On the other hand, the new federal Public Service Staff Relations Act 162/, which provides for arbitration of interest disputes, is too new to yield a useful body of data. No systematic assessment appears to have been made of the now-repealed Quebec public service legislation. 163/

Bearing in mind that the Ontario hospital statute is still in its infancy, some useful lessons may therefore be learned from experience with compulsory arbitration under that legislation. However, before generalizing from this experience to the broad prospects for compulsory arbitration in essential industries, certain special circumstances must be noted. First, the statute came into force in 1965, during a period of labour militancy, so that its effect on union-management relations must be measured not only against the past experience of hospital workers but also against the contemporaneous experience of other unions. Second, the initial period of operation may not be an accurate guide to the future because the unfamiliarity of the statute and uncertainty of the parties may have led to less frequent invocation of arbitration. As the operation of the Act becomes more widely known and its procedures and possibilities more firmly established, there may be fewer disincentives to arbitration. This premise is suggested by the data that follow. Third, hospital wages and working conditions would likely have improved, quite apart from collective bargaining, because of a more widespread community concern with health services. In the past two decades, Canada had witnessed the advent of hospital insurance, prepaid medical insurance, and finally, government-run "medicare" plans. Upgrading of the calibre (and income) of paramedical personnel was thus made financially possible, and impliedly was assigned a high social priority by these schemes. Finally,

the force of the political circumstances that produced the legislation is not yet spent and may well influence the behaviour of the parties and their attitudes.

1. The Legislative History

In one sense, the Act was typical of essential industry dispute settlement legislation: it originated in a situation that was said to be a crisis. As the result of particularly embittered and fruitless negotiations 164/ between the Building Service Employees union and the Trenton Memorial Hospital, a strike of non-professional staff occurred—virtually the first recorded in Ontario. Amidst dire predictions of death and disaster, and confronted with the prospect of one or more additional hospital strikes, the government appointed a royal commission with the twofold task of resolving the Trenton dispute and propounding a general legislative scheme of dispute settlement. 165/ In so far as the design of the legislation was entrusted to a royal commission, rather than hastily improvised, there was a departure from the customary plot of essential industry disputes. The commissioners 166/ repaid the confidence thus displayed in them by first settling the Trenton dispute and then proceeding to a careful and thorough examination of the views of labour, management and neutral spokesmen, and of the available literature.

Without detailing the views of those who presented briefs 167/, certain broad trends are discernible. First, with the notable exception of the Building Service Employees, labour unions were outspoken in their opposition to the use of compulsory arbitration. Second, although some management representatives were suspicious of, or hostile to, compulsory arbitration as a general matter, the majority favoured its use in hospital labour disputes. Much the same position was taken by the neutrals who presented briefs.

Third, there was a general desire by those who accepted arbitration to preserve, if possible, the vitality of collective bargaining as a primary means of dispute settlement in hospitals elsewhere.

The Commission took its stand on this last issue. Its principal recommendation was that the cabinet be empowered to submit a dispute to arbitration (a) "when patient care is adversely affected or seriously threatened" by a strike, or (b) if either party is guilty of a refusal to bargain in good faith. 168/ However, the legislation, as enacted, did not preserve this element of uncertainty. It simply stipulated 169/ that in the event of an impasse in collective bargaining and upon the failure of conciliation, the parties are obliged to submit their differences to arbitration. This formula put squarely to the test the theory that the automatic availability of arbitration would lead the parties to treat bargaining itself as a mere rehearsal or ritual.

2. Experience Under the Act

In point of fact, the experience under the statute to date has partially corroborated the theory. As Table 3-2 shows, there have been 55 cases in the three and one quarter years since the passing of the Act in which the parties failed to resolve their dispute either in direct negotiations or at conciliation. The same chart indicates that in those situations where the parties needed to invoke the assistance of a third party, conciliation has (except for the period July-December 1967) consistently solved a larger number of these more intractable disputes than adjudication. There are, however, signs of a drift towards arbitration. Not only has the total number of arbitrations increased sharply since early 1967 but more importantly the effectiveness of conciliation seems to have declined substantially. In successive

TABLE 3-2

ONTARIO HOSPITAL LABOUR DISPUTES NOT SETTLED BY DIRECT NEGOTIATIONS

1964 - 1967

Method of Disposition

Date	By Council Officer	Pending Council Board	By Council Board	Pending Arbitration Board	Total Settled	Arbitration	TOTAL
Jan. - June 1964	9	—	4	1	14	—	14
July - Dec. 1964	5	1	4	2	12	—	12
Jan. - Mar. 1965	4	2	4	1	11	—	11
Apr. - June 1965	6	—	1	2	9	0(%)	9
July - Dec. 1965	14	—	2	2	9	6(25%)	24
Jan. - June 1966	9	—	1	1	11	5(31%)	16
July - Dec. 1966	6	—	1	2	9	5(36%)	14
Jan. - June* 1967	12	1	2	2	17	13(43%)	30
July - Dec. 1967	8	—	—	1	9	15(63%)	24
Jan. - June 1968	20	—	—	1	21	11(35%)	32

* The 1968 figures include only cases completed during the period indicated. There are in addition 9 cases set down for arbitration, 3 cases about to be set down for arbitration and 6 cases in which one of the parties to a contract dispute have indicated to the Ontario Department of Labour that arbitration is contemplated. Since mid-1967 a distinct trend away from the use of conciliation boards has developed. Such boards are now used only in rare instances where a great number of iasues are in dispute.

periods since the enactment of the statute, the percentage of cases not settled in direct negotiation which went to arbitration because they were not resolved by conciliation has increased from 0% to 25%, then to 31%, 36%, 43%, and latterly 65%.

This trend only assumes its true proportions, however, when looked at in the larger context of the ratio of settlements of all types as against arbitrations. Table 3-3 shows that of 190 agreements in force as of July 1967, in bargaining units covered by the Act, only 16 (8.4%) were the product of arbitration. Fully 119 (62.6%) of these agreements were settled without even the intervention of a conciliation officer and one third of the cases destined for arbitration after a conciliation board failed to resolve them were settled en route to adjudication. However, when a follow-up study was made one year later, in July 1968, it seemed clear that the parties were placing ever-greater emphasis on arbitration. Although the percentage of agreements settled by direct negotiation had increased from 62.6% to 69.5%, conciliation seemed to be much less effective and the percentage of arbitrated agreements had increased from 8.4% to at least 13.3% and likely as high as 19.1% of the total (assuming that a group of cases scheduled for arbitration in fact are so disposed of). Whether the trend to arbitration during the statute's third year will be arrested remains to be seen. However, even given the current incidence of arbitration, the parties seem not to have entirely abandoned collective bargaining. They continue to strive for consensus even on the eve of arbitration.

It is impossible to discover objective reasons as to why parties might choose to settle rather than arbitrate, but an attempt was made to plumb the attitudes of those involved in hospital labour relations in order to seek an

TABLE 3-3

HOSPITAL COLLECTIVE AGREEMENTS IN FORCE IN ONTARIO
(BY METHOD OF SETTLEMENT)

Method of Settlement	As of July 1, 1967 No.	%	As of July 1, 1968 No.	%
Direct negotiation*	119	62.6	160	69.5
Conciliation Officer	38	20	39	16.7
Negotiation, pending appointment of Conciliation Board	1	.3	1	.4
Conciliation Board	8	4.3	0	0
Negotiation, pending award of Arbitration Board	8	4.3	2	.8
TOTAL NEGOTIATED AGREEMENTS	(174)	(91.5%)	(202)	(86.6%)
Arbitration awards	16	8.4%	31**	13.3%**
TOTAL AGREEMENTS	190	100%	233	100%

* Includes all cases in which there is no record of any other type of settlement.

** At the time these figures were compiled, an additional 18 disputes had been (or were about to be) set down for arbitration. If all of them actually were permitted by the parties to go to arbitration, the number of arbitrated agreements would rise to 49 of a total of 251, or 19.1% of all agreements in force.

explanation. It was felt that their beliefs about compulsory arbitration might well be an important factor in their resort to this procedure. Accordingly, in June 1967, a questionnaire was sent to approximately 235 persons who had been engaged in hospital labour relations in Ontario during the preceding several years. This list was compiled from an examination of hospital collective agreements, reports of conciliation boards, and arbitration awards on file at the Ontario Department of Labour; additional names were added on the suggestion of persons active in the field. In a number of cases, interviews were conducted in order to elicit more detailed answers to certain evaluative questions. A total of 118 responses was received, comprising:

	Questionnaires	Respondents
Management Representatives:	150	83
Union Representatives:	70	23
Neutrals (arbitrators, conciliators):	15	12
	235	118

The distributions of responses discloses an over-representation of management opinion due to the fact that a single union official who dealt with a large number of hospitals often responded on behalf of a number of persons in his organization.

All three groups felt that the introduction of compulsory arbitration had helped to make collective bargaining easier or had at least left the difficulties of bargaining unchanged. Union representatives were more inclined to feel that arbitration facilitated bargaining while management generally felt that the situation was more or less unchanged (Table 3-4). This finding is rather surprising in view of the widespread fear that, given the

TABLE 3-4

SINCE THE INTRODUCTION OF COMPULSORY ARBITRATION HAS THERE BEEN DIFFICULTY IN CONCLUDING AGREEMENTS BY DIRECT NEGOTIATION?

	Amount of Difficulty Encountered			
	Less	Same	More	N/C
Labour	9	5	6	3
Management	12	43	16	11
Neutral	2	2	1	7
TOTAL	23	50	23	21

TABLE 3-5

SINCE THE INTRODUCTION OF COMPULSORY ARBITRATION HAS THERE BEEN A NEED TO INVOKE CONCILIATION PROCEDURES?

	Frequency of Conciliation			
	Less	Some	More	N/C
Labour	11	6	3	3
Management	20	35	9	18
Neutral	2	—	—	10
TOTAL	33	41	12	31

possibility of arbitration, parties might be unwilling to compromise their differences. However, it is corroborated by the reaction of both sides to the effect of compulsory arbitration on the need to invoke conciliation. If voluntary agreements prove more difficult to obtain in direct negotiations, a more intensive use of conciliation should be anticipated. However, both management and labour agree this is not the case (Table 3-5) although the union representatives are more inclined than management to believe an actual reduction in the need for conciliation occurred. As has been seen, the subjective reaction is more or less corroborated by the objective facts: a relatively small percentage of cases actually go to arbitration and the parties seem largely able to resolve their differences without even invoking conciliation. This pattern is reinforced by the apparent decision by the government to avoid appointing conciliation boards; during the first six months of 1968, no conciliation boards were appointed in hospital disputes.

Much more surprising are the divergent beliefs of the parties as to the effect of compulsory arbitration on the bargaining strength of the union (Table 3-6). Almost half of the unionists believe that it has weakened their bargaining power while only 20% of the management respondents and only a single neutral share this view. Paradoxically, each of the protagonists feels that the other gets the better of arbitration (Table 3-7). Hospital representatives overwhelmingly believe that they can settle at the same cost or more cheaply, pre-arbitration, than they would have to pay if the matter proceeded to the ultimate step of adjudication. Unions, on the other hand, seem to believe, by an overwhelming majority, that arbitrators will give them the same as, or less than, they could gain in direct negotiations. Only a tiny fraction of unionists felt that voluntary settlements are lower than those which might be secured at arbitration. In other words, each party

TABLE 3-6

HAS THE INTRODUCTION OF COMPULSORY ARBITRATION AFFECTED THE BARGAINING STRENGTH OF HOSPITAL EMPLOYEES?

Labour's Present Bargaining Strength

	Weaker	Same	Stronger	N/C
Labour	11	2	10	2
Management	13	24	38	9
Neutral	1	—	8	3
TOTAL	25	26	56	14

TABLE 3-7

HOW DO WAGES AWARDED BY ARBITRATORS COMPARE WITH THOSE OBTAINED THROUGH VOLUNTARY SETTLEMENTS?

Level of Negotiated Wages

	Lower	Same	Higher	N/C
Labour	2	10	8	3
Management	30	22	15	—
Neutral	3	3	—	6
TOTAL	35	35	23	9

operates on diametrically opposed premises, but the beliefs of each lead to a preference for negotiated settlement over arbitration.

While fully 50% of the neutral respondents refuse to disclose which of the two parties of interest more accurately gauged their awards, none of those who did respond felt that arbitration awards were below the level of negotiated settlements. Responses were equally divided between those who thought that arbitrated wages were the same as those which would have been negotiated and those who thought that the awards were higher. The figures were inconclusive, but to the extent they show anything, they tend to indicate that hospital employers are in fact well-advised to settle in advance of arbitration. Why, then, do unions not press for arbitration more frequently, especially since, as has been noted, they believe that the availability of arbitration has enhanced their collective bargaining positions?

Certainly, the answer to this question is not found in the reaction of the respondents to their personal, first-hand arbitration experiences. If anything, most unionists (about 66% of those who answered the question) were satisfied with the disposition of their particular cases (Table 3-8) while barely 50% of the management representatives were. More likely the explanation lies in the principled opposition by unionists to compulsory arbitration, an opposition expressed by all but one of the unions appearing before the Bennet Royal Commission whose recommendations led to the present legislation. This hypothesis is borne out by the fact that dissatisfaction with the present scheme was expressed almost exclusively by members of those unions that had opposed its introduction while union respondents favourable to the present statute had been advocates of compulsory arbitration.

TABLE 3-8

HAS YOUR PERSONAL EXPERIENCE WITH COMPULSORY ARBITRATION BEEN SATISFACTORY?

	Satisfaction with Arbitration Experience		
	Satisfied	Dissatisfied	N/C
Labour	12	6	5
Management	16	15	51
Neutral	6	4	3
TOTAL	34	25	59

TABLE 3-9

IS LABOUR GENERALLY SATISFIED WITH THE COMPULSORY ARBITRATION SYSTEM?

	Labour Satisfaction with Arbitration System		
	Satisfied	Dissatisfied	N/C
Labour	7	16	--
Management	42	21	19
Neutral	5	2	5
TOTAL	54	39	24

The conviction that labour is dissatisfied with compulsory arbitration is strongly expressed (Table 3-9): about 70% of the unionists surveyed voiced this belief in general terms, although an almost equal majority had indicated personal satisfaction with their actual arbitration experience. Surprisingly, both management and neutrals, by two-to-one majorities, believe that labour is satisfied with the present arrangement. Does this reflect a misperception by non-labour persons of labour's true reaction—or an accurate assessment which unionists feel unable to make because they are ideologically wedded to an anti-arbitration position? Of management's commitment to compulsory arbitration, there can be little doubt (Table 3-10); management, labour and neutral respondents all agree on this, with over 75% of the management group professing satisfaction. It is therefore possible to speculate that management's belief in labour's satisfaction is a reflection of its own, perhaps wishful, thinking prompted by a desire to preserve the present statute.

On the other hand, there is evidence to suggest that labour's stated position of opposition to arbitration is not its real position. For example, 50% of the unionists favour retention of the present statute with amendments and an additional 12% favour its retention unaltered (Table 3-11). Again, by a two-to-one majority unionists are convinced that the public is well-served by the regime of compulsory arbitration (Table 3-12), an admission that would not lightly be made by those who feel it is a pernicious system. It should be noted, however, that most unionists favourably disposed come from the same labour organization. Also, management representatives are even more firmly committed to the retention of compulsory arbitration and to the belief that this system is in the public interest. (Not surprisingly, neutrals are almost unanimous on both points). Thus, the union majority in favour of retention must be viewed, relatively speaking, as a slim vote of confidence.

TABLE 3-10

IS MANAGEMENT GENERALLY SATISFIED WITH THE COMPULSORY ARBITRATION SYSTEM?

	Management Satisfaction with Arbitration System		
	Satisfied	Dissatisfied	N/C
Labour	9	6	7
Management	57	18	7
Neutral	5	2	5
TOTAL	71	26	19

TABLE 3-11

SHOULD THE PRESENT SYSTEM OF COMPULSORY ARBITRATION BE RETAINED, AMENDED OR ABOLISHED?

	Future of Arbitration System			
	Retained	Amended	Abolished	N/C
Labour	3	12	9	—
Management	44	24	15	—
Neutral	6	6	—	—
TOTAL	53	32	24	—

TABLE 3-12

IS THE PUBLIC SERVED WELL OR BADLY BY THE PRESENT SYSTEM OF COMPULSORY ARBITRATION?

	Impact of Arbitration System on Public		
	Well-served	Badly-served	N/C
Labour	14	7	4
Management	60	14	7
Neutral	9	—	3
TOTAL	83	21	14

Yet it must again be stressed that in the year following this survey (i.e., from July 1, 1967 to June 30, 1968) the incidence of recourse to arbitration increased sharply. Whether this is attributable to a general tightening of the purse strings by hospital employers is impossible to ascertain. The new pattern is at least consistent with a growth of sophistication by unionists as they come to realize that they likely will do no worse in arbitration than in negotiation and that they might as well gamble on a favourable award rather than settle for less. In short, we may be witnessing the triumph of realism over the ideological proposition that arbitration hurts labour.

A final set of questions was designed to identify specific trouble-spots in the present legislation and to explore the possibility of amendments on the basis of a labour-management-neutral consensus. In each case this existed, although in each case labour is somewhat more reform-minded than management. In part, this may be due to the fact that individual labour representatives tend to be involved in arbitration more frequently than management representatives; in part it may be due to the fact that labour bears the onus of proof in arbitration proceedings and is therefore more sensitive to the need to facilitate proof. In particular, it seems that there would be substantial support for:

(a) wage determination in each local labour market, rather than in each separate bargaining unit (Table 3-13):

(b) provision of comparative wage data to the arbitration board by an impartial agency (Table 3-14);

(c) better-trained arbitrators, perhaps assigned permanently or on a rotating basis to hospital arbitration (Table 3-15).

WOULD YOU FAVOUR CHANGES IN THE PRESENT SYSTEM OF COMPULSORY ARBITRATION?

TABLE 3-13

Fix Wage Levels by Geographic Area

	Province-wide	Local areas	No Change
Labour	8	8	7
Management	9	38	34
Neutral	1	8	3
TOTAL	18	54	44

TABLE 3-14

Provision of Wage Data by Impartial Agency

	Favourable	Unfavourable
Labour	16	6
Management	42	36
Neutral	9	3
TOTAL	67	45

TABLE 3-15

Changes in Arbitration Boards

	Better Training	Permanent Panel	Rotating Panel	N/C
Labour	15	4	1	2
Management	30	27	2	23
Neutral	1	2	4	5
TOTAL	46	33	7	30

Some further clue to the attitudes of the parties can be gleaned from a study of actual arbitration experience. (See Appendix D.) In particular, it should be noted that of the 28 awards issued between April 1965 and July 1967, only twice were the same parties involved in arbitration. In view of the fact that awards are, by statute, limited to one year's operation, any bargaining relationship that had been involved in arbitration between April 1965 and April 1966 might have given rise to a second arbitration within the period under study. Yet, of the ten eligible relationships, only two resorted a second time to arbitration. Whether the first arbitration was so distasteful as to make even settlement preferable, or so helpful as to facilitate compromise at the next negotiations, cannot be known.

Looking more closely at those hospitals that have been involved in more than one arbitration, it should be noted that in one, arbitration was invoked in three different bargaining units, in a second in two different bargaining units (and a second time in one of them), and in a third hospital, twice in the same bargaining unit. (Of the 20 other hospitals involved in arbitration, their experience was limited to a single case.) This concentration of awards in three hospitals suggests that some particular strains may exist within those relationships that impede settlement. Something of a similar concentration of awards exists on the union side as well. Two locals of the Building Service Employees account for 12 of the 28 cases (about 43%) which may indicate a predilection for arbitration by this union. It will be recalled that the Building Service Employees was the only union that has consistently endorsed compulsory arbitration and that largely evinced satisfaction with the operation of the present statute. However, the Building Service Employees Union has only been involved in a single instance in a second arbitration with the same hospital, which indicates that it has by no means abdicated its responsibility to resolve disputes through collective bargaining.

At least for the present, then, it can fairly be stated that in the initial period (down to June 30, 1967) collective bargaining survived the introduction of a regime of compulsory arbitration. To this extent the fears of most experts seemed to be groundless. More recent experience, indicating growing recourse to arbitration, may well verify the conventional wisdom. But even if the parties should return to the earlier sparing use of arbitration, there is a "higher criticism" of the institution which can only be tested in the light of actual experience. This line of objection to arbitration begins from the premise that institutional rigidities will simply not permit arbitrators to decide issues for the parties in an acceptable fashion. As has been shown (Table 3-8), arbitration has won a substantial vote of confidence from union respondents who have been personally involved in it and at least a grudging one from their employer counterparts. Consumer judgment, then, does not seem to validate the theory.

Turning to an analysis of the 28 arbitration cases decided during the first two years of the statute (up to June 30, 1967) a number of interesting facts emerge.

First, it had been predicted that arbitrators appointed ad hoc would not acquire the familiarity with hospital conditions that would be needed as the basis of consistent and principled awards. In point of fact, four arbitrators have each heard at least three cases and between them are responsible for 50% of all awards. Of these four, only one was a county court judge so that three of the four remain available to the parties despite the recent withdrawal of judges from arbitration work. However, these statistics must be set against the responses of labour and management to the questionnaire already referred to. As has been shown in Table 3-14, a substantial body of labour and management opinion seems to believe that better trained

arbitrators are needed and that the calibre of decision-making would be improved by the creation of either a single board to hear all cases or the assignment of cases in rotation to a panel of arbitrators. This latter suggestion was supported by a number of neutrals, amongst whom there was some feeling that they would thereby be insulated against pressures that might distort their awards.

A second fear was that, however well-intentioned, arbitrators would be overwhelmed by the variety and complexity of the issues thrust forward to arbitration rather than settled by direct negotiation. Appendix D shows that in fact the widest possible range of issues has come to arbitration. In three cases the arbitrators were simply advised that "every issue" or "the entire agreement" was in dispute. Of the remaining 25 cases, monetary issues occurred with the following frequency:

wages	25 cases
vacation/holidays	20
fringe benefits	17
welfare	12
hours/shifts	11

Because these issues are susceptible of relatively objective measurement and comparison, they are somewhat easier to dispose of than non-monetary issues. However, non-monetary issues did arise in approximately 50% of all cases; union security was in issue in 14 of 28 cases and contract language (work rules, etc.) in 15 cases. In terms of the ability of arbitrators to cope with a broad spectrum of issues, it is perhaps significant that in each of the three cases where "all issues" were submitted to the board for decision, the board initiated negotiations between the parties which resulted in

settlement of the dispute (or of most of the issues) without adjudication. So far as is disclosed on the face of the awards, this technique was employed on only one other occasion on which a lengthy (though finite) list of issues was presented for decision.

Most arbitrators who commented on the point at least purported to be engaged in a process of adjudication rather than conciliation or mediation. Thus, it is important to identify both the standards selected by the arbitrators to measure the positions of the parties and the sources of information used by them in applying these standards in the particular case.

A fairly intensive analysis of the awards yields a cluster of factors that are said to influence arbitrators although seldom are these factors translated into precise calculations, at least on the face of the judgments. There appears to be considerable interest in arriving at awards which will approximate settlements the parties would have arrived at through a process of free collective bargaining. Ancillary to this objective, or perhaps for lack of other data, very frequent reference is made to hospital agreements negotiated throughout the province or region, or in comparable institutions. Adjustments are then made for cost-of-living increases, for peculiarities of the local labour market and for general movements in industrial wages.

Relatively few awards face up to the issue of differentials between hospital workers and those employed in comparable occupations in industry. While there are a number of references to industrial wage levels and trends, these are mostly of peripheral importance. Several arbitrators have clearly expressed their reluctance to simply erase hospital-industry differentials and only one arbitrator has overtly identified this as an objective. In the long run, preservation of the historic low-wage position of hospital workers

will no doubt create much dissatisfaction. However, it is difficult for arbitrators to adopt any other standard than inter-hospital comparisons, at least in the absence of a mandate from the government to upgrade hospital salaries. The one area where general industrial practice seems to have most impact is in relation to union security and other similar non-monetary matters. Surprisingly, over 50% (13 of 24 "adjudicated" awards) were unanimous. However, the two major themes running through the dissenting awards were, on the union side, the board's failure to meet general industrial wages and, on the employer side, the introduction or strengthening of a union security clause.

A final consideration influencing arbitrators was the negotiating positions of the parties. In some cases by implication, in some by express language, the position of the hospital and the union were treated as upper and lower limits within which the award was bound to fall. However, one award cautioned against too rigid adherence to positions taken in bargaining for fear that this might create disincentives to settlement. Several awards complained of a failure by the union to support its demands with evidence and one stigmatized the union's position as "unrealistic" and "not sufficiently responsible". However, these awards still regarded the hospital's offer as a potential minimum and the union's demand as a potential maximum. In two cases the award was explicitly based on pre-arbitration settlements achieved in direct negotiations but repudiated in the one case by the union membership and in the other by hospital officials.

Relatively little discussion appears in the awards of the data presented to the board by either party but it is clear that virtually no fact gathering is done by the board of its own motion. However, as Table 3-14 indicates, there is substantial support (especially amongst unionists and neutrals) for the proposal that statistical data be provided by an impartial agency. This

would no doubt ease the burden on the parties and facilitate the decision-making function. However, because the union has the onus of presenting persuasive evidence to support its demands, while the hospital need merely cast doubt upon the union's case, the unions' greater enthusiasm for the proposal is understandable.

Another factor which may account for the unions' desire to be relieved of the burden of gathering and presenting evidence is the cost of this process, especially in relation to the number of employees involved. As Appendix D shows, 10 of the 28 awards involved bargaining units of operating engineers which almost inevitably contain only a very few individuals. Also related to the bargaining unit problem is the difficulty faced by a single local union charged with the duty of dealing with a number of hospitals, especially if they are within one local labour market. For example, of the 11 union locals involved in arbitration, four locals accounted for 20 cases, while seven others accounted for only eight cases. A local union engaged in multiple arbitrations is confronted with not only considerable expense but internal political embarassment as well if settlements and awards create invidious distinctions between employees performing like work in different bargaining units.

It is not surprising, therefore, to find that unionists are very much in favour of province-wide or regional contract settlements or arbitrations (Table 3-13). What is unexpected, however, is the apparent willingness of hospitals to abandon traditions of autonomy in favour of such a system. Perhaps the explanation lies in the fact that operating budgets are now almost entirely derived from the Ontario Hospital Services Commission so that little is to be gained from economies effected through low wage rates. On the contrary, by paying the "going rate" for hospitals in the area, management can

minimize the turnover of staff and thus perhaps enhance the quality of patient care without diverting funds from other parts of the budget.

This oblique reference to the Ontario Hospital Services Commission is merely prefatory to a discussion of one of the most perplexing features of the Ontario arbitration system. As noted, hospitals derive virtually all of their operating funds from this body which is charged with the obligation of distributing premiums levied under a compulsory hospital care insurance plan. Each hospital submits an annual budget to the Commission for approval but these budgets contain no provision for increases in labour costs beyond those which are certain to occur. Thus, a hospital which negotiates a new collective agreement or which is bound by an arbitration award must ask the Commission for a supplementary grant for the balance of the fiscal year. Some hospitals have apparently hidden behind the Commission's ultimate financial control, using it to shield their opposition to an increase both in negotiations and before an arbitrator, alleging that their request for a supplementary budget would not be met.

If, in fact, the Commission did decline to meet the costs of either a settlement or an award it would be exercising a veto over collective bargaining although not a party to the process. However, there is actually no evidence that this has happened and apparently the Commission has adopted a policy of forcing local hospital managements to accept responsibility for their labour relations decisions. Certainly, any other policy would be quite unfair unless the Commission were prepared to sit at the bargaining table or appear before an arbitrator to defend its position in each case. Yet the Commission cannot merely rubber stamp the hospital's budget. First, there is only a limited amount of money to be spent and the Commission must ensure

its equitable distribution amongst a number of claimants. Second, if the hospital is automatically given whatever it seeks by the Commission, it will have no incentive to engage in hard bargaining with the union. So far, the Commission appears to have operated effectively through a process of guidance and supervision rather than direct intervention in collective bargaining. Perhaps its most useful activity has been a programme designed to help hospital administrators develop job evaluations with which they may make reasonable responses and counter-proposals to union negotiators.

But a fundamental problem remains unresolved. In effect, the citizens of Ontario are "taxed" to provide a fund out of which hospital operating costs will be met. But the distribution of the fund, at least in relation to labour costs, is determined not by considerations of good hospital care but by the pressures of collective bargaining. For example, to the extent that there is mobility of hospital personnel, public funds are used to attract workers to unionized hospitals by subsidizing the higher wages offered there. Thus, citizens served by non-union hospitals are paying the same premium but may be cared for by a more transitory, less skilful staff. Similarly, across the whole province, the need to meet higher labour costs may divert funds from other important items, e.g., research. To the extent that this shift in priorities of expenditure results from market forces, it may be unavoidable. However, when an arbitration award compels this, in effect one public body is making decisions that properly fall within the competence of another. Nor is the problem resolved by increasing premiums or taxes in order to preserve medical care priorities while meeting wage claims. This approach in effect confers on a series of ad hoc arbitration boards the power to levy taxes.

The problem is intensified by another consideration. So long as wages and working conditions were the product of voluntary agreement (however accurate that description was in the hospital context) the public accepted no responsibility for the quality of the settlement. Throughout the economy, low wages are accepted as evidence of poor bargaining power and the answer to the complaints of hospital workers would be "get more if you can". But now that even this highly hypothetical possibility has been removed and a regime of compulsory arbitration has been imposed upon the parties, can the public retain its posture of neutrality towards the terms of employment? There is much to be said for the proposition that an arbitration board should be authorized to award not simply the level of wages which power bargaining would have yielded but rather a fair and decent wage which compensates hospital employees not only for their labour but for their loss of freedom as well.

Putting the matter negatively, an arbitration board should not place its imprimatur on labour conditions which are unjust or inequitable. The difficulty with this line of argument is a technical one: how can the arbitrator translate these high principles into a specific award of cents-per-hour or a change in work rules? Beyond the most obvious cases, broad considerations of justice and equity are of little assistance. 170/ What is needed are guidelines and standards for decision-making, devised not by each individual arbitrator for his particular case but laid down by legislation as public policy. 171/

Taking the Ontario Hospital Labour Disputes Arbitration Act, 1965 as a prototype of the compulsory arbitration solution to essential industry disputes, what lessons can be learned from its functioning to date?

(1) The introduction of compulsory arbitration need not sound the death knell of collective bargaining but there is some reason to anticipate a decline in negotiated settlements and increased recourse to arbitration.

(2) The viability of collective bargaining is greatly affected by the beliefs and expectations of the parties and especially their conviction that arbitration is unlikely to yield a different or more advantageous agreement than voluntary settlement. As this conviction slowly yields to contrary evidence, diffidence about arbitration diminishes and collective bargaining solutions become relatively less attractive.

(3) Arbitrators are often unable or unwilling to articulate the basis of their awards. Coupled with the unavailability of objective and relevant data and the absence of clearly-defined decisional standards, this may contribute to an atmosphere in which arbitration is uncertain and hence unattractive. However, as a matter of principle, it is impossible to justify the deliberate creation of an unsatisfactory arbitration mechanism.

(4) Compulsory arbitration creates a dynamic of its own in favour of more highly centralized bargaining, at least where it affects a multiplicity of small bargaining units.

(5) In an industry where budgets are derived from public funds (or, presumably, from rates regulated by a public body) the compulsory arbitration system intrudes into other non-labour policy decisions. Some mechanism must be devised to determine budget priorities without distorting either labour relations or the primary activity of the industry.

All of these conclusions, it must again be emphasized, are derived from the initial experience of one particular statutory scheme within the peculiar context of hospital labour relations. This observation is intended both to warn against the drawing of over-broad conclusions and to underline the desirability of creating special solutions for the problems of particular industries.

F. Postscript: The British Columbia Mediation Commission Act

In 1968 the Province of British Columbia passed the Mediation Commission Act 172/ which represents a substantial departure in the Canadian approach to public interest disputes. The Act was presumably inspired by the report of Mr. Justice N.T. Nemetz of the British Columbia Supreme Court on Swedish Labour Laws and Practices. 173/ After sketching the basic outlines of the Swedish system, Mr. Justice Nemetz recommended that British Columbia should attempt to emulate its Mediation Service by creating a special group of mediators, stressing that "the men recruited should be of high talent and paid salaries commensurate with those paid in industry". 174/ He also recommended the appointment of a permanent industrial inquiry commission which would "gain experience over a period of time and thus come to the hearings well informed and quickly able to attack substantive issues". 175/ The Commission, he suggested, should generally supervise the mediation service, should employ competent staff and should have as its members men of some considerable distinction. The Nemetz Report also included a number of recommendations designed to strengthen institutions involved in the process of industrial peacekeeping: labour-management committees at both the provincial and plant level, a new and independent research institute whose results would be freely available to the parties and the public, and more appropriate and efficient machinery for the disposition of grievance disputes.

The Mediation Commission Act does not precisely or entirely adopt the recommendations of Mr. Justice Nemetz but it is broadly in keeping with their spirit. The statute establishes a Mediation Commission which comprises a chairman and (now) two other members. 176/ In broad terms, it is entrusted with the task of securing industrial peace both by settling individual

disputes referred to it and by inquiring into "economic growth, labour-management relations, productivity, problems of adjustment, ...and such other matters as may seem calculated to maintain or secure industrial peace and to promote conditions favourable to settlement of disputes." 177/

In this monumental task the Commission is to be assisted by an expert staff 178/ and by sweeping powers of investigation. 179/

The Commission's dispute settlement procedures must now be described in detail. In the generality of disputes, the Commission is empowered to appoint a mediation officer at the request of either party although it is not bound to do so. Parenthetically, this represents another departure from the traditional Canadian pattern of automatic recourse to conciliation. However, public interest disputes are dealt with somewhat differently. The Act provides that the Minister of Labour

> ...may, at any time during the course of collective bargaining..., if he considers that the public interest is or may be affected by a dispute, direct the Commission to appoint a Mediation Officer to confer with the parties, and the Commission shall comply with such a direction. 180/

The intervention of the Commission itself begins with

> an inquiry for the purpose of (a) clarifying any matters in dispute; (b) defining any facts...; (c) deciding which party shall bear the burden of proof.... 181/

Having thus established the boundaries of the dispute, the Commission next delivers to each of the parties a "Statement of Matters in Dispute", simultaneously serving them with a notice of hearing. A procedural code enables the Commission to arrange for what are in effect pleadings and ultimately to convene a hearing of a rather formal nature. 182/

The Commission's deliberations are intended to produce a Decision. Section 15 of the Act specifically directs that

> ...the Decision shall state the terms and conditions of a collective agreement which in the opinion of the Commission would be a fair and reasonable collective agreement between the parties, together with reasons supporting the opinion held by the Commission.

While, in relation to ordinary disputes, the Decision is not binding unless the parties specifically agree to make it so 183/, the contrary will normally be true in the case of public interest disputes.

The statute authorizes the Lieutenant-Governor in Council (the provincial cabinet) to refer to the Commission any unresolved dispute when, in its opinion, such action "is necessary, in order to protect the public interest and welfare". 184/ This procedure may be resorted to whether or not the parties have already had recourse to the normal arrangements for bargaining and mediation 185/ and is also to be used in disputes involving civil servants. 186/ What is profoundly significant about a cabinet order referring the dispute to the Commission is that it effectively terminates the right to strike or lock out. 187/ This would be a serious matter in and of itself but there does not appear to be a compensating requirement that all such disputes are to be disposed of by an authoritative Decision of the Commission. The statute simply states that the cabinet "may" stipulate that the Commission's order is "final and binding". 188/ Of course, it is almost unthinkable that in practice the right to strike would be taken away without some other effective means of dispute settlement being established. Thus, to all intents and purposes, final and binding mediation can be expected to be invoked in all public interest disputes.

As might be expected, the broad discretionary power vested in the provincial cabinet to terminate the right to strike in any given dispute, and at any stage of a dispute, was viewed with considerable alarm and resentment by trade unionists. It may be that the hostility engendered by the passage of the Act has seriously undermined any prospect of success which it otherwise might have had. Offsetting this, to some extent, is the fact that the government has demonstrated its commitment to making the Act work by appointing three distinguished individuals as the chairman and members of the Commission (a former Supreme Court judge, a leading trade unionist, and a prominent management official) and by paying them salaries that far exceed any paid to leading public servants, judges or, indeed, most provincial premiers. In assessing the prospects for the successful operation of the Act, these extra-legal considerations cannot be put aside. The determination of the parties to make the legislation work and the skill and stature of those entrusted with its administration are obviously factors of prime importance.

However, in terms of whether or not the British Columbia approach is one that can usefully be imitated, it is necessary to consider the basic conception of the statute. On the affirmative side, there is implicit in the broad mandate given to the Mediation Commission recognition of the fact that reduction of labour strife cannot be the product of isolated efforts addressed to individual controversies. The decisions to create a permanent Commission, to enable it to gather facts about the environment and institutions of industrial relations in general, and to analyze those facts by utilizing the services of skilled economists, lawyers, and other social scientists, are all to be regarded as positive features of the legislation.

On the other side of the ledger, however, there are several features of the statute that (at least in principle) appear to be subject to some criticism. First, there is the broad power of the provincial cabinet to intervene in disputes that are only very loosely defined as affecting "the public interest and welfare". Potentially, almost any major labour dispute might fall within this definition. If it is indeed the intention of the legislation to replace the present regime of collective bargaining with a new regime of final and binding mediation, this ought to have been announced overtly. Second, and in much the same vein, the parties have no way of knowing at the outset of their negotiations whether or not the cabinet will decide to intervene should conflict threaten. Intervention, then, may be seen as an act of favouritism designed to rescue the weaker party, or to rob the stronger of the advantages of its economic superiority. The fact that intervention is based on an ad hoc political judgment of the cabinet may further create resentment. It can hardly be anticipated that a party compelled to participate in mediation under such circumstances will do so in a frame of mind that is conducive to the making of concessions. Third, the provincial cabinet is deliberately made the custodian of industrial peace. The fact that it alone can take measures to end a strike by referring a dispute to the Commission makes the cabinet a lightening rod for violent pressures from both parties. Every collective bargaining crisis is potentially extrapolated into a political crisis. Neither industrial peace nor general political stability is likely to be advanced by such a situation.

Fourth, there are a host of problems associated with the draconian device of outlawing strikes and lockouts. If a pattern of intervention develops, the parties may come to expect it and rely upon it; they may become more intent on building a record for the Mediation Commission than in seeking

accomodation through genuine bargaining. Here, the wisdom and restraint of those administering the Act will be all-important. Enforcement of a prohibition against strikes and lockouts may also prove difficult. The Statute provides stiff penalties for offenders 189/ and for corporate and union officers who "assent to" offences. 190/ But penalties may be an invitation to martyrdom, and there are no affirmative techniques provided by which (for example) a business could be seized and re-opened in the event an employer refuses to end a lockout or some equivalent action taken against defiant strikers or their union.

Fifth, the process of mediation established by the Act is decision-oriented rather than settlement-oriented. This may be its greatest weakness. While the mediation officer stage of the proceedings appears to envisage genuine efforts at resolving the underlying conflicts, when the dispute passes into the hands of the Commission itself, the procedures appear to be designed to highlight the adversary posture of the parties. The careful definition of issues, the exchange of pleadings, the presentation of formal evidence and argument, and the court-like Decision of the Commission hardly afford an opportunity for the kind of informal persuasive role played by mediators who are seeking to vindicate the process of collective bargaining by assisting the parties in finding their own solutions. It is true that the parties are free to bring the proceedings of the Commission to a close by executing a collective agreement. 191/ Whether a party will turn back from an adjudication once he believes he is en route to a potentially favourable decision will depend on the degree of incentive he has to do so. In this regard, extra-legal persuasion by the Commission might be useful (if it feels it can act outside of its statutorily-defined role), as would an element of unpredictability in the decisions of the Commissions.

This last point—the settlement-producing effects of unpredictability—raises one further difficulty. The Commission is instructed to produce a Decision that states:

> ...terms and conditions of a collective agreement which...would be a fair and reasonable collective agreement between the parties, together with reasons supporting the opinion held by the Commission. 192/

It will be difficult for the Commission to avoid giving meaning to the very nebulous phrase "fair and reasonable", especially since it is instructed to give reasons. Over a period of time, it may well develop a kind of "economic jurisprudence" that will influence not only its own future decisions but, indirectly, non-mediated settlements as well. At this point, the Commission will become inextricably involved in the process of governing the province's economy (as has, for example, the Australian Arbitration Court). Yet the statutory language quoted above expressly stipulates that the Commission is to have regard to what is "a fair and reasonable collective agreement between the parties" (emphasis added). How can the Commission simultaneously serve two masters: the criterion of private "reasonableness" and that of public policy?

But the proof of the pudding will be in the eating. Alone of all the provinces of Canada, British Columbia has actually had some experience with the process of compulsory mediation. As indicated above 193/, several statutes had provided as the terminal point of bargaining resort to final and binding conciliation by either a conciliation officer or a conciliation board. The Mediation Commission Act supersedes at least one of these statutes, but no doubt the experience gained under them is what persuaded the government to utilize the device on an even broader scale.

REFERENCES

1/ Industrial Disputes Investigation Act, Stat. Can. 1907, c.20, sec. 2. (c).

2/ Toronto Electric Comm. v. Snider, (1925) A. C. 396, (1925) 2 D. L. R. 5, (1925) 1 W. W. R. 785; rev'g 55 O. L. R. 454, (1924) 2 D. L. R. 761 (C.A.).

3/ See e.g., Regina v. O. L. R. B., ex rel. Dunn, (1963) 2 O. R. 301, 39 D. L. R. 2d. 346.

4/ See: Laskin, Constitutional Law 434 (3d. ed. 1966); Scott, Federal Jurisdiction Over Labour Relations: A New Look, 6 McGill L. J. 153 (1959-60). The federal claim to jurisdiction is found in the Industrial Relations and Disputes Investigations Act, R. S. C. 1952, c. 152, sec. 53.

5/ See e.g., Woods, Canadian Policy Experiments with Public Interest Disputes; 14 Lab. L. J. 739, 742 (1963); See also, Woods, ed., Patterns of Industrial Dispute Settlement in Five Canadian Industries (1958); Jamieson, Industrial Relations and Government Policy, 17 C. J. E. P. S. 25 (1951); Phillips, Government Conciliation in Labour Disputes, 22 C. J. E. P. S. 523 (1956); Woods, Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal, 21 C. J. E. P. S. 447 (1955).

6/ Quebec no longer provides for the appointment of conciliation boards although conciliation officers are appointed on the application of either party. Labour Code, Stat. Quebec 1964, c. 45 s. 43. Other provinces provide for either a one-step or a two-step conciliation process, sometimes leaving the choice to the parties, sometimes to the government, see e.g., Labour Relations Act, R. S. O. 1960, c. 202, s. 14, as amended Stat. Ont. 1964 c. 53, R. S. M. (1954), c. 132, s. 16 (4), as amended Stat. Man. 1962, c. 35.

7/ In Swait v. Trustees of Maritime Transport Unions, (1967) Quebec B. R. 315, 61 D. L. R. 2d. 317 (1966), the Court upheld the constitutional validity of a federal statute imposing government trusteeship on a number of unions representing maritime workers on the Great Lakes. While the statute was designed to end a series of disruptive work stoppages caused by inter-union rivalry, the majority of the court relied upon federal jurisdiction over navigation and shipping. Only Brossard, J., was prepared to uphold the statute on the basis that the disruption of shipping created "a state of emergency 'going beyond local or provincial concern or interest which should from its inherent nature be the concern of the dominion as a whole'...." Id. at 325, 61 D. L. R. 2d. at 332.

8/ (1925) A. C. at 412.

9/ Id. at 415.

10/ Id. at 414.

11/ Id. at 412.

12/ Id.

13/ Scott, supra, ref. 4 at 162.

14/ See generally, Bernstein, Enarson and Fleming, eds., Emergency Disputes and National Policy (1955); Horlacher, A Political Science View of National Emergency Disputes, 33 Annals 85 (1961).

15/ Collective Bargaining Act, Stat. Ontario 1943, c. 4; Wartime Labour Relations Regulations, 1944, P. C. 1003, passed pursuant to the War Measures Act, Rev. Stat. Canada 1927, c. 206. See for the evolution of collective bargaining legislation in Canada, Carrothers, Collective Bargaining Law in Canada, pt. I (1965).

16/ Breaches of Contract Act, Stat. Canada 1877, c. 35, s. 2, now Criminal Code, Stat. Canada 1953-54, c. 51, s. 365 (1). Section 365 (2) relieves from liability any employee striking after exhaustion of all relevant requirements of applicable dispute settlement legislation.

17/ Trades Arbitration Act, Stat. Ontario 1873, c. 26; Trade Disputes Act, Rev. Stat. Ontario 1894, c. 42; Labour Conciliation Act, Stat. British Columbia 1894, c. 23; Conciliation Act, Stat. Canada 1900, c. 24; Trade Disputes Act, Stat. Quebec 1901, c. 31.

18/ See generally, Anton, The Role of Government in the Settlement of Industrial Disputes in Canada, c. 4 & 5 (1962); Woods & Ostry, Labour Policy and Labour Economics in Canada, c. 3. (1962).

19/ Miners Arbitration Act, Stat. Nova Scotia 1888, c. 3 (compulsory arbitration of wage disputes in coal mines), replaced by Industrial Peace Act, Stat. Nova Scotia 1925, c. 1 (non-binding conciliation, followed by binding arbitration, for labour disputes in mines and public utilities).

20/ Railway and Municipal Board Act, Stat. Ontario 1906, c. 31, ss. 58, 59 (voluntary arbitration and non-binding mediation and fact-finding provided for labour disputes in public utilities, railways, and street railways); Municipal Strikes and Lock-outs Act, Stat. Quebec 1921, c. 46 (compulsory non-binding arbitration for policemen, firemen, waterworks employees, and employees engaged in burning garbage).

21/ Railway Labour Disputes Act, Stat. Canada 1903, c. 55 (non-binding conciliation, arbitration); Conciliation and Labour Act, R. S. C. 1906, c. 96 (general voluntary conciliation: compulsory conciliation on railways); Industrial Disputes Investigation Act, Stat. Canada 1907, c. 20 (compulsory conciliation, postponement of strikes, in labour disputes involving "any mining property, agency of transportation or communication, or public service utility").

22/ See e.g., Conciliation Act, Stat. Canada 1900, c. 24, s. 4(c).

23/ Industrial Disputes Investigation Act, Stat. Canada 1907, c. 20, s. 5.

24/ Conciliation and Labour Act, R. S. C. 1906, c. 96, ss. 6, 13.

25/ Industrial Disputes Investigation Act, Stat. Canada 1907, c. 20, ss. 56, 57.

26/ Id., s. 2(c).

27/ See Scott, op. cit. supra, ref. 4.

28/ Supra, ref. 21.

29/ Id.

30/ Latterly re-enacted as R. S. C. 1927, c. 110; never re-enacted or repealed.

31/ See Woods and Ostry, op. cit. supra, ref. 18, p. 45.

32/ Id. at p. 252.

33/ See ref. 5, supra.

34/ Stat. Canada 1914 (2nd. Session), c. 2; re-enacted by R. S. C. 1927, c. 206.

35/ Stat. Canada 1907, c. 20.

36/ National Steel Car Corp. Strike, 41 Lab. Gaz. 493 (1941).

37/ Montreal Tramway Co. Strike, (1945) 44 Lab. Gaz. 1205 (1944), 45 Lab. Gaz. 971 - 72, 1408.

38/ Steel Workers Strike in Ontario and Nova Scotia, 43 Lab. Gaz. 191 - 92 (1943).

39/ Coal Mining Industry, 43 Lab. Gaz. 1647 (1943).

40/ For accounts of the Canadian wartime experience, see Stewart, Wartime Labour Problems and Policies in Canada, 7 C. J. E. P. S. 426 (1941); Logan, Trends in Collective Bargaining, 9 C. J. E. P. S. 331 (1943); Laskin, Recent Labour Legislation in Canada, 22 Can. B. Rev. 776 (1944); Woods and Ostry, op. cit. supra, ref. 18, p. 61 ff.

41/ Stat. Canada 1948, c. 54.

42/ Stat. Canada 1943, c. 4.

43/ See Labour Relations Board Act, Stat. Ontario 1944, c. 29, Schedule A.

44/ The Police Act, Rev. Stat. Alberta 1955, c. 236, ss. 24 - 30, as amended, Stat. Alberta 1956, c. 41; Municipal Act, Rev. Stat. British Columbia 1960, c. 255, s. 194; Labour Relations Act, Rev. Stat. Manitoba 1954, c. 132, s. 21(2); The Police Act, Rev. Stat. Ontario 1960, c. 298, ss. 26 - 35; Industrial Relations Act, Stat. Prince Edward

Island 1962, c. 18, s. 44; Labour Code, Rev. Stat. Quebec 1964, c. 141, ss. 82, 93, 142; City Act, Rev. Stat. Saskatchewan 1965, c. 147, s. 104.

45/ Fire Departments Platoon Act, Rev. Stat. Alberta 1955, c. 114, s. 14; Municipal Act, Rev. Stat. British Columbia 1960, c. 255, s. 194; Fire Departments Arbitration Act, Stat. Manitoba 1954, c. 8, ss. 6, 8; Fire Departments Act, Rev. Stat. Ontario 1960, c. 145, ss. 6, 7; Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 44; Labour Code, Rev. Stat. Quebec 1964, c. 141, ss. 82, 93; Fire Departments Platoon Act, Rev. Stat. Saskatchewan 1965, c. 173, s. 10.

46/ British Columbia Hydro and Power Authority Act, Stat. British Columbia 1964, c. 7; The Alberta Labour Act, Rev. Stat. Alberta 1955, c. 167, s. 99, as amended, Stat. Alberta 1960, c. 54; Labour Relations Act, Rev. Stat. Manitoba 1954, c. 132, s. 78, as amended, Stat. Manitoba 1958, c. 29; Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 42; Essential Services Emergency Act, Stat. Saskatchewan 1966, c. 2; Trade Union Act, Rev. Stat. Nova Scotia 1954, c. 295, s. 68(2), as amended, Stat. Nova Scotia 1965, c. 53; Toronto Hydro-Employees Union Dispute Act (1965), Stat. Ontario 1965, c. 131, ss. 3, 4, 6; Ontario Hydro-Employees' Union Dispute Act (1961-62), Stat. Ontario 1961-62, ss. 2, 3, 5.

47/ Hospital Employees (Employment) Act 1966 - 67, Stat. Newfoundland 1967, c. 11; Hospital Labour Disputes Arbitration Act, 1965, Stat. Ontario 1965, c. 48; Alberta Labour Act, Rev. Stat. Alberta 1955, c. 167, s. 99, as amended, Stat. Alberta 1960, c. 54; Essential Services Emergency Act, Stat. Saskatchewan 1966, c. 2, s. 4, 7.

48/ Maintenance of Railway Operation Act, 1966, Stat. Canada 1966, Bill C-230; Railway Operation Continuation Act, Stat. Canada 1960-61, c. 2; Maintenance of Railway Operation Act, 1950, Stat. Canada 1950-51, c. 1.

49/ St. Lawrence Ports Working Conditions Act, Stat. Canada 1966-67, Bill C-215; Maritime Transportation Unions Trustees Act, Stat. Canada 1963, c. 17.

50/ British Columbia Coast Steamship Service Act, Stat. Canada 1958, c. 7; Transportation Board Act, Rev. Stat. Quebec 1964, c. 228, as amended, Stat. Quebec 1965, Bill 1.

51/ Public Schools Act, Rev. Stat. British Columbia 1960, c. 319, s. 140, as amended, Stat. British Columbia 1965, c. 41; Public Schools Act, Rev. Stat. Manitoba 1954, c. 215, s. 379(b), as amended, Stat. Manitoba 1956, c. 53; An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, Stat. Quebec 1967, Bill 25.

52/ Public Service Act, Rev. Stat. Alberta 1955, c. 263, ss. 56 - 60, as amended, Stat. Alberta 1965, c. 75; Constitution Act, Rev. Stat. British Columbia 1960, c. 71, as amended, Stat. British Columbia 1959, c. 17; Public Service Staff Relations Act, Stat. Canada 1967, c. 72; Civil Service Act, Rev. Stat. Manitoba 1954, c. 39, s. 45, as amended, Stat. Manitoba 1965, c. 11; Civil Service Act, Rev. Stat. New Brunswick 1952,

c. 29, s. 52, as amended, Stat. New Brunswick 1964, c. 17; Public Service Act, Rev. Stat. Ontario 1960, c. 331, s. 19, as amended, Stat. Ontario 1962-63, c. 118, Stat. Ontario 1966, c. 130; Civil Service Act, Stat. Quebec 1965, c. 14.

53/ Trade Union (Emergency Provisions) Act, Stat. Newfoundland 1959, c. 2; Labour Relations (Amendment) Act, Stat. Newfoundland 1959, c. 1.

54/ Labour Relations Act, Rev. Stat. Manitoba 1954, c. 132, s. 78, as amended, Stat. Manitoba 1958, c. 29; Trade Unions Act, Rev. Stat. Nova Scotia 1954, c. 295, s. 68(2) as amended, Stat. Nova Scotia 1965, c. 53.

55/ Alberta Labour Act, supra, ref. 46.

56/ Supra, ref. 47, s. 3.

57/ Labour Relations Act, supra, ref. 46, s. 78.

58/ Employees of the Liquor Control Commission are subject to this procedure. See Labour Relations Act, supra, ref. 46, s. 55(2)(b).

59/ Supra, ref. 44, s. 99.

60/ Id., s. 1(n).

61/ Id., s. 99.

62/ Supra, ref. 52, s. 75.

63/ Supra, ref. 61.

64/ Supra, ref. 52.

65/ Id., ss. 36, 59.

66/ Id., s. 79.

67/ Id., s. 10 (1)(c).

68/ R. S. C. 1952, c. 96.

69/ Maritime Transportation Unions Trustees Act, supra, ref. 49; British Columbia Coast Steamship Service Act, supra, ref. 50.

70/ Civil Defence Act, S. B. C. 1951, c. 9.

71/ Emergency Measures Act, S. P. E. I. 1959, c. 4, as amended by S. P. E. I. 1966, c. 3.

72/ Hospitals Act, R. S. Q. 1964, c. 164, s. 17.

73/ Transportation Board Act, R. S. Q. 1964, c. 228, as amended by S. Q. 1965, Bill 1.

74/ An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, supra, ref. 51.

75/ To an extent, the rate structure of the two major lines (and the public ownership of one of them) reflects a belief that the railway is an instrument of national policy linking east and west and underpinning the prosperity of the key wheatgrowing areas on the prairies.

76/ S. B. C. 1959, c. 17, s. 6(3); now R. S. B. C. 1960, c. 71, s. 6.

77/ A. G. B. C. v. Ellsay, (1959) 19 D. L. R. 2d 453 (B. C. S. C.).

78/ Judicature Act, R. S. O. 1960, c. 197, s. 17(3).

79/ Trade Unions Act, R. S. B. C. 1960, c. 384, s. 6(1).

80/ Report of the Royal Commission on Employment of Firemen on Diesel Locomotives (Kellock Report) (1957, Canada); Industrial Commission Relating to C. N. R. Run-Throughs (Freedman Report) (1965, Canada).

81/ Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees (Bennett Report) (1964, Ontario). As well, in 1966 Judge Rene Lippé was appointed under the Quebec Hospitals Act to inquire into the hospital strike in that province, see Carrothers, Recent Developments in Labour Law and Policy, in (1967) Spec. Lect. Law Soc. Upper Canada 249.

82/ On July 17, 1962, Mr. Justice T. G. Norris was appointed as the Industrial Inquiry Commission on the Disruption of Shipping, following a 30-hour disruption of shipping along the St. Lawrence River on July 5 and 6.

83/ In August 1966, Mr. L. A. Picard was appointed as an Industrial Inquiry Commission to investigate certain matters connected with the settlement of a dispute affecting longshoremen in the ports of Montreal, Trois-Rivières and Quebec. Under the provisions of the St. Lawrence Ports Working Conditions Act, Stat. Canada 1966-67, Bill C-215, his recommendations were made binding on the parties. In the same year, Mr. Justice C. Rhodes Smith was appointed to inquire into a strike by foremen in the west coast longshoring industry, see Carrothers, op. cit. supra., ref. 81.

84/ Judge J. C. Anderson was appointed as an Industrial Inquiry Commission to inquire into salaries during the 17-day postal strike in 1965. Following a return to work by all the strikers except those in Montreal, a nation-wide referendum among the postal workers accepted Judge Anderson's recommendations. In a subsequent vote, taken separately, the Montreal workers also adopted the recommendations. (1965) 65 Lab.Gaz. 789.

85/ Professor A. W. R. Carrothers was appointed a Board of Reference in 1958 to inquire into, and make recommendations on, the collective bargaining claims of British Columbia civil servants. The government's refusal to publish his report in 1959 led to a strike, see Carrothers, op. cit. supra, ref. 81.

86/ Report of the Brandon Packers Strike Commission (Tritschler Report) (1961, Manitoba).

87/ Federal-Provincial Committee on Wage and Price Disputes in the British Columbia Fishing Industry (1964).

88/ Royal Commission Inquiry into Certain Activities of the International Brotherhood of Teamsters in Connection with Truckers Hauling Sand and Gravel in the Toronto-Hamilton Area (Roach Report) (1958, Ontario); Royal Commission on Labour-Management Relations in the Construction Industry (Goldenberg Report) (1962, Ontario).

89/ See Alberta Labour Act, Rev. Stat. Alberta 1955, c. 167, s. 94, as amended, Stat. Alberta 1964, c. 41; Labour Relations Act, R. S. B. C. 1960, c. 205, s. 45; Industrial Relations and Disputes Investigation Act, R. S. C. 1952, c. 152, s. 21; Labour Relations Act, Rev. Stat. New Brunswick 1952, c. 124, s. 20; Labour Relations Act, Rev. Stat. Newfoundland 1952, c. 258, s. 22; Trade Unions Act, Rev. Stat. Nova Scotia 1954, c. 295, s. 21, as amended, Stat. Nova Scotia 1964, c. 48; Labour Relations Act, R. S. O. 1960, c. 212, s. 45; Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 38.

90/ See Cunningham, Compulsory Conciliation and Collective Bargaining, The New Brunswick Experience (1958); Herbert, Conciliation Boards in British Columbia, 3 Curr. Law and Soc. Prob. 130 (1963); Kovacs, Compulsory Conciliation in Canada, 10 Lab. L. J. 100 (1959); Levinson, Compulsory Conciliation Machinery in Ontario, 1 O. H. L. J. 47 (1958); Taylor, Conciliation, in (1954) Spec. Lect. Law Soc. Upper Canada 113: Phillips, Government Conciliation in Labour Disputes, 22 C. J. E. P. S. 523 (1955): Woods, Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal, 21 C. J. E. P. S. 447 (1955).

91/ Industrial Disputes Investigation Act, Stat. Canada 1907, c. 20, s. 30.

92/ Ibid, ss. 25, 26.

93/ Levinson, supra, ref. 90, p. 53. But see Herbert, supra, ref. 90.

94/ See ref. 6, supra.

95/ In 1956 a strike of railway firemen was avoided by the appointment of a royal commission to investigate their future use on diesel trains. In 1966 a longshoremen's strike was brought to a halt by the government's promise to investigate complaints of bad working conditions; as part of the settlement, in effect, the St. Lawrence Ports Working Conditions Act, Stat. Canada 1966-67, Bill C-215, was passed, establishing acceptable minimum guarantees for the men.

96/ For example, in 1956 the railways were permitted to increase freight rates to cover an additional wage burden incurred as the result of concessions made under government pressure.

97/ This occurred, for example, during the railway negotiations of 1954, the Air Canada strike of 1966, and the Quebec Hydro strike of 1967.

98/ Seizure occurred during the 1954 strike of grainhandlers, the 1958 strike of coastal ferries in British Columbia and the 1966 strike of Quebec hospital workers.

99/ Trade Unions Act, Rev. Stat. Nova Scotia 1954, c. 295, s. 68(2), as amended by Stat. Nova Scotia 1965, c. 53.

100/ Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 42, as amended, Stat. Prince Edward Island 1966, c. 19.

101/ Labour Code, Stat. Quebec 1964, c. 141, s. 99, as amended, Stat. Quebec 1965, c. 50.

102/ Railway Operation Continuation Act, Stat. Canada 1960-61, c. 2.

103/ Hospital Employees (Employment) Act, Stat. Newfoundland 1966-67, c. 11.

104/ An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, Stat. Quebec 1967, Bill 25.

105/ Rev. Stat. Quebec 1964, c. 164, s. 17.

106/ Transportation Board Act, Rev. Stat. Quebec 1964, c. 228, as amended, Stat. Quebec 1965, Bill 1.

107/ In 1966, without seizing the CNR ferries (which were obviously beyond the reach of provincial power) the government of Prince Edward Island used its general emergency powers to order seamen to restore service to the mainland, which had been interrupted by the national railway strike.

108/ See Wilson, Compulsory Arbitration in Relation to Collective Bargaining and Critical Disputes, (unpublished address to Canadian Bar Association, Quebec City, Sept., 1967).

109/ British Columbia Coast Steamship Service Act, Stat. Canada 1958, c. 7.

110/ Trade Union (Emergency Provisions) Act, Stat. Newfoundland 1959, c. 21; Labour Relations Act, Rev. Stat. Newfoundland 1952, c. 258, as amended Stat. Newfoundland 1959, c. 1.

111/ Labour Relations Act, Rev. Stat. Newfoundland 1952, c. 258, as amended Stat. Newfoundland 1960, c. 58, Stat. Newfoundland 1963, c. 82.

112/ Maritime Transportation Unions Trustees Act, Stat. Canada 1963, c. 17.

113/ Report of the Industrial Inquiry Commission on the Disruption of Shipping (Norris Report) (1963, Canada).

114/ The constitutionality of the Maritime Transportation Unions Trustees Act was upheld in Swait v. The Board of Trustees of the Maritime Transportation Unions, (1966) 66 CLLC Para. 14, 152 (Quebec C. A.). But see Schneiser, Civil Liberties in Canada 222 (1964).

115/ Trade Unions Act, Rev. Stat. Prince Edward Island 1951, c. 164, s. 23, as amended, Stat. Prince Edward Island 1953 (2d sess.), c. 3: repealed by Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 58.

116/ Civil Service Act, Rev. Stat. Manitoba 1954, c. 39, as amended, Stat. Manitoba 1965, c. 11.

117/ British Columbia Hydro and Power Authority Act, Stat. British Columbia 1964, c. 7, s. 56.

118/ Municipal Act, Rev. Stat. British Columbia 1960, c. 255, s. 194.

119/ Stat. British Columbia 1968, Bill 33. This legislation will be discussed in a separate section of this study, infra.

120/ Public Service Act, R. S. A. 1955, c. 263, ss. 59 - 60, as amended Stat. Alberta 1965, c. 75.

121/ Written inquiries to the provincial departments of labour yielded the following data: Prince Edward Island — used once (1953); Manitoba — never used: British Columbia — used in 1966 three times for firemen, twice for policemen, once for British Columbia Hydro & Power Authority employees, and in an unspecified number of disputes involving teachers.

122/ The Alberta Labour Act, Rev. Stat. Alberta 1955, c. 167, s. 99(1), (3), as amended, Stat. Alberta 1960, c. 54.

123/ A rare instance of this involved a newspaper bargaining unit. See The Ottawa Citizen, O. L. R. B. Mthly Rep. 535 (October, 1966).

124/ City Act, Rev. Stat. Saskatchewan 1965, c. 147, s. 104; Fire Departments Platoon Act, Rev. Stat. Saskatchewan 1965, c. 173, s. 10; Fire Departments Arbitration Act, Stat. Manitoba 1954, c. 8, s. 6.

125/ Fire Departments Platoon Act, Rev. Stat. Alberta 1955, c. 114, s. 14; The Police Act, Rev. Stat. Alberta 1955, c. 236, ss. 24 - 30, as amended, Stat. Alberta 1956, c. 41; Fire Departments Arbitration Act, Rev. Stat. Manitoba 1954, c. 8, s. 6; The Police Act, Rev. Stat. Ontario 1960, c. 298, ss. 26 - 36; Fire Departments Act, Rev. Stat. Ontario 1960, c. 145, s. 6; Industrial Relations Act, Stat. Prince Edward Island 1962, c. 18, s. 44, as amended, Stat. Prince Edward Island 1966, c. 19; Labour Code Rev. Stat. Quebec 1964, c. 141, s. 82: City Act, Rev. Stat. Saskatchewan 1965, c. 147, s. 104; Fire Departments Platoon Act, Rev. Stat. Saskatchewan 1965, c. 173, s. 10.

126/ Hospital Labour Disputes Arbitration Act, 1965, Stat. Ontario 1965, c. 48, ss. 5, 7; Industrial Relations Arbitration Act, Stat. Prince Edward Island 1962, c. 18, s. 44, as amended Stat. Prince Edward Island 1966, c. 19; Essential Services Emergency Act, Stat. Saskatchewan 1966, c. 2, s. 4.

127/ Toronto Hydro—Employees' Union Dispute Act (1965), Stat. Ontario 1965, c. 131, ss. 3, 4; Ontario Hydro—Employees' Union Dispute Act (1961-62), Stat. Ontario 1961-62, c. 94, ss. 2 - 3; Essential Services Emergency Act, Stat. Saskatchewan 1966, c. 2, s. 4.

128/ See ref. 51, supra.

129/ Maintenance of Railway Operation Act, 1950, Stat. Canada 1950-51, c. 1, s. 5; Maintenance of Railway Operation Act, 1966, Stat. Canada 1966-67, Bill C-230, ss. 9, 10.

130/ Stat. Ontario 1965, c. 48.

131/ See Welland County General Hospital, 16 Lab. Arb. Cas. 1 (1965); St. Joseph's Hospital, 16 Lab. Arb. Cas. 353 (1965).

132/ Stat. Canada 1967, c. 72.

133/ Id., ss. 36, 59.

134/ Id., ss. 37(2), 38.

135/ See p. 6, supra.

136/ Report of the Preparatory Committee on Collective Bargaining in the Public Service (1965, Canada), at 35.

137/ Supra, ref. 126, s. 6(1).

138/ S. 68: In the conduct of proceedings before it and in rendering an arbitration award in respect of a matter in dispute the Arbitration Tribunal shall consider

(a) the needs of the Public Service for qualified employees;
(b) the conditions of employment in similar occupations outside the Public Service, including such geographic industrial or other variations as the Arbitration Tribunal may consider relevant;
(c) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
(d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
(e) any other factor that to it appears to be relevant to the matter in dispute.

139/ Report of the Royal Commission on Employer-Employee Relations in the Public Services of New Brunswick, (S. J. Frankel, Commissioner, 1967).

140/ Northrup and Bloom, Government and Labour, 420-1 (1963).

141/ See Industrial Relations and Disputes Investigation Act, R. S. C. 1952, c. 152, s. 17.

142/ See infra, study on Ontario Hospital Labour Disputes Arbitration Act, 1965.

143/ Maintenance of Railway Operation Act, 1950, S. C. 1950-51, c. 1; Maintenance of Railway Operation Act, 1966, S. C. 1966, Bill C-230.

144/ Railway Operation Continuation Act, S. C. 1960-61, c. 2.

145/ British Columbia Coast Steamship Act, S. C. 1958, c. 7.

146/ Maritime Transportation Unions Trustees Act, S. C. 1963, c. 17.

147/ St. Lawrence Ports Working Conditions Act, S. C. 1966-67, Bill C-215.

148/ Cole, The Role of Government In Emergency Disputes, 26 Temp. L. Q. 375 (1953).

149/ For example, in 1966 the federal government was prevented from introducing legislation to end a strike of longshoremen in British Columbia by the refusal of a single member (M. G. Gregoire, a self-styled Quebec separatist) to consent to a motion to suspend the rules of the House of Commons, the unanimous consent of the House being required in such a case.

150/ See e.g., Public Service Staff Relations Act, Stat. Canada 1967, c. 72.

151/ See infra, the Ontario Hospital Labour Disputes Arbitration Act, 1965.

152/ Alberta Labour Act, R. S. A. 1955, c. 167, s. 99.

153/ Transport Board Act, R. S. Q. 1964, c. 228, as amended, S. Q. 1965, Bill 1.

154/ Labour Code, S. Q. 1964, c. 141, s. 99, as amended, S. Q. 1965, c. 50.

155/ Horlacher, A Political Science View of National Emergency Disputes, 33 The Annals 85 (1961).

156/ Civil Service Act, S. Q. 1965, c. 14, s. 75; Public Service Staff Relations Act, S. C. 1967, c. 72.

157/ Public Schools Act, R. S. B. C. 1960, c. 319, s. 138(5), as amended, S. B. C. 1965, c. 41.

158/ For example, in British Columbia there is legislation preventing the picketing of provincial government buildings and a number of statutory provisions which labour regards as pernicious, e.g., the Trade Unions Act, R. S. B. C. 1960, c. 384.

159/ Alberta Labour Act, R. S. A. 1955, c. 167, s. 99; Labour Relations Act, R. S. M. 1954, c. 132, s. 78.

160/ Stat. Ontario 1965, c. 48.

161/ See Appendix D.

162/ Stat. Canada 1967, c. 72.

163/ Trade Disputes Act, R. S. Q. 1941, c. 169; replaced by Public Services Employees Disputes Act, Stat. Quebec 1944, c. 31; superseded by the enactment of the Labour Code, Stat. Quebec 1964, c. 45.

164/ See Trenton Memorial Hospital, (1963) 64 CLLC p. 16, 302 (O. L. R. B.).

165/ The order-in-council establishing the Commission provided that it should "...inquire into and report upon the feasibility and desirability of applying compulsory arbitration in the settlement of disputes...affecting hospitals and their employees and, in particular, to the settlement of a dispute concerning the Trenton Memorial Hospital and its employees...."

166/ Judge C. E. Bennett, chairman; R. V. Hicks, Q. C., a management lawyer; Harry Simon, a union official.

167/ See Royal Commission Report on Comulsory Arbitration in Disputes Affecting Hospitals and their Employees, Part II, pp. 11-26.

168/ Id. at pp. 50-51.

169/ Section 4.

170/ For a discussion of this theme, see Welland County General Hospital, 16 LAC 1 (1966).

171/ See Public Service Staff Relations Act, supra, ref. 3.

172/ Stat. British Columbia 1968, c. 26.

173/ Report of Swedish Labour Laws and Practices (to the Hon. L. R. Peterson, Q. C., Minister of Labour, British Columbia) (1968, British Columbia).

174/ Id. at p. 12.

175/ Ibid.

176/ Section 28.

177/ Section 39.

178/ Section 34.

179/ Sections 38, 43, 44.

180/ Section 11(2).

181/ Section 13.

182/ Section 14.

183/ Section 16.

184/ Section 18(1).

185/ Section 18(1)(ii).

186/ Section 19.

187/ Section 21.

188/ Sections 18(1)(ii), 19(1)(B).

189/ Sections 50, 51.

190/ Section 51(2).

191/ Sections 17, 18(2).

192/ Section 15(1).

193/ See Appendix B.

194/ Section 80 of the Mediation Commission Act repeals the relevant provision of the British Columbia Hydro and Power Authority Act, Stat. British Columbia 1964, c. 7.

CHAPTER IV

UNITED STATES LEGISLATIVE EXPERIENCE 1/

A. The Constitutional Framework

Basically, jurisdiction over labour relations in the United States is vested in the federal government because of its sweeping authority to regulate interstate and international commerce. 2/ Thus, not only do transportation and communications fall within the scope of federal control but so too do virtually all important industries such as steel, coal and automobile manufacturing, whose supplies are derived from, or whose products enter, the flow of interstate commerce. In addition, federal responsibility for national defence brings federal labour law to the aerospace industry and to a variety of enterprises connected with defence production and installations. Federal law is therefore pre-eminent in both ordinary and essential industry labour relations.

State jurisdiction, on the other hand, extends mainly to a residue of employment situations excluded from federal control, either because they are too insignificant to attract the interest of federal legislators or, more importantly, because they are local non-profit institutions or state-owned instrumentalities. Into this latter category fall hospitals and public power systems.

In addition, the states enjoy a "police power" that entitles them to legislate for the protection of life, property and public order. The police power might be thought to justify state intervention in essential industry strikes, but in fact has not been held to provide a sound foundation for labour legislation. 3/ An early Kansas law which provided for compulsory

arbitration of all labour disputes within state jurisdiction was struck down as a violation of due process 4/, but this decision antedated the development of present-day federal collective bargaining policies. More significant is a 1951 Supreme Court decision 5/ which held that federal legislative policy had pre-empted the whole field of regulation of labour controversy affecting commerce. Since federal legislation expressly declared that the right to strike is preserved, except to the extent that it is specifically diminished by the National Labor Relations Act 6/, a general state ban on strikes in utilities was struck down. A subsequent state attempt to ban such strikes under the police power by declaring them to be an interference with the "public interest, health and welfare", justifying state seizure of the enterprise, likewise failed. 7/

The difficulty, as will be seen, is that the federal government has not used its authority to legislate in respect of local essential industry disputes. The Railway Labor Act is designed to cope with disputes in two "essential" industries, railways and airlines, and the Taft-Hartley Act deals with national emergencies. But the local utility strike is left to be dealt with under the general labour law relating to ordinary employment situations.

For purposes of this study, of course, the constitutional position is only significant in so far as it helps to explain the pattern of legislation that has emerged. 8/ Some of the state legislation that has been declared unconstitutional does provide interesting insights into possible solutions to the essential industry dispute problem and will be examined for that reason.

B. Federal Legislation

1. The Railway Labor Act

Public preoccupation with railway labour disputes began with the strikes of the 1870's and built to a fever pitch in the Pullman strike of 1894. However, modern legislation probably begins with a national strike in 1916 designed to secure the 8-hour working day. This strike was ended by congressional action bringing this important concession to the railway workers and establishing a Commission to study railway labour relations. 9/ Shortly thereafter, with United States entry into the war, the government assumed control of the railways. The government Railroad Administration established commissions to investigate wages and working conditions and bipartisan boards of adjustment to handle grievances. In this friendly atmosphere, of course, unionism flourished. However, with the return of the industry to private control in 1920, relations with management quickly degenerated.

Following a six-year period of labour strife, the Railway Labor Act of 1926 was finally passed 10/ and it has remained in force, basically unchanged for over 40 years. In 1936 airlines were brought under the Railway Labor Act. In broad outline, the legislation provides:

(1) a method of selecting bargaining representatives and preventing unfair labour practices,

(2) a duty to bargaining collectively, and to refrain from unilateral changes in working conditions,

(3) compulsory arbitration of grievances by a bipartisan tribunal, paid by public funds (this provision does not apply to airlines), and

(4) a method of postponing (but not prohibiting) strikes, to permit effective mediation.

It is this last feature of the Act that requires special scrutiny.

If the parties are unable to resolve a dispute in direct negotiations, they may invoke the services of the National Mediation Board. The Board may also "proffer its services in case any labor emergency is found by it to exist any any time". Although the overall success of the Board's mediation efforts is substantial, its record in major disputes of national importance can only be described as negligible. If the Board fails to bring the parties to an agreement, it must next invite the parties to submit their differences to arbitration. The parties, however, are under no compulsion to agree to arbitration and do so relatively infrequently. Between 1934 and 1962, only 270 interest disputes were submitted to the arbitral tribunal, the National Railway Adjustment Board; most of these were cases of lesser importance. 11/ Parenthetically, it should be noted that the Act provides a detailed code of arbitration procedure, including provision for court enforcement of the award.

Assuming that arbitration is rejected, if the case in the opinion of the Mediation Board threatens "to deprive any section of the country of essential transportation service", the President is notified. He may appoint an ad hoc Emergency Board which makes non-binding recommendations for settlement. While the Emergency Board is seised of the case (for 30 days, plus any extension agreed to by the parties) and for a further 30-day period, no stoppage of work is permitted. However, once the Emergency Board procedure has run its course, the Act provides no further impediments to a strike or lockout. 12/

Up to the outbreak of World War II, the railways enjoyed a period of labour peace, at least by comparison with industry in general. The Railway Labor Act was credited with this happy record and won a reputation as model labour legislation. However, in retrospect, commentators seem to feel that factors indigenous to the industry, rather than the Act itself, were responsible for its apparent success. 12/ In any event, during these early years very few Emergency Boards were created—only 16 between the Act's passage in 1926 and the last peacetime year, 1940. At this point, a new pattern began to emerge. Unions would regularly reject the recommendations of an Emergency Board which would then become a floor above which further negotiation would be undertaken. To prevent the crisis of a railway strike, a friendly (or panicky) administration would then intervene on an ad hoc basis to pressure the employer to concede terms more favourable than those that had been recommended. This intervention ranged from simple exhortation, through the appointment of special fact-finding bodies, to threats of ad hoc legislation and even seizure of the operation.

The postwar record has not been a particularly happy one. Between 1947 and 1966 the emergency provisions were invoked on 127 occasions as opposed to 44 times during the preceding 20-year period, almost triple the former rate. In addition, in some 34 cases—about 30%—a strike followed exhaustion of the Emergency Board's efforts. 13/ Why?

First, the procedure of the boards leaves much to be desired. Typically, issues arrive before it that have not been properly or thoroughly canvassed (and sometimes not even defined) in direct negotiations. For example, one board was asked to canvass no less than 37 issues involving 12,000 pages of testimony and exhibits, in a period of about two weeks. 14/

In the words of one author:

> The ritual of presenting the case to the board is as stylized as the courtship dance of the great crested grebe. 15/

Obviously, the proliferation of issues, and the attempt to resolve them through court-style hearings of great complexity and length, are both serious obstacles to the success of the board's peacekeeping efforts. Moreover, in the opinion of many experts, the very necessity of preparing for the board exercises a detrimental influence on pre-board negotiations: instead of eliminating minor issues and moving towards common ground, the parties concentrate on building a case for the board.

This highlights a second point. The appointment of Emergency Boards has become so commonplace that there is little incentive for the parties to agree without a board hearing. The consequence of disagreement is no longer a strike but rather the appointment of a board. It is clear from the Act's statutory history and from early experience under it that Emergency Boards were intended to be appointed infrequently and only in cases of special importance. 16/ Under pressure of the need to maintain service during wartime, appointments gradually became more frequent; under political pressures in the postwar period, this trend was intensified.

Indiscriminate use of the emergency procedure, in turn, has produced a lack of respect for it. 17/ Indeed, there is a risk inherent in any legislative scheme that over a period of time the very fact that it has been resorted to may distort or diminish its initial impact. 18/

Some support for this hypothesis is found in the experience of the middle and late 1950's when the Eisenhower administration appears to have appointed

boards somewhat less frequently. During this period the increase in voluntary settlements was perceptible. However, special factors may explain the willingness of unions to accept settlements without the appointment of a board: the general slowdown in the economy and the decline in railway traffic in particular; the increasingly aggressive stance of the carriers in seeking changes in work rules; the tendency of boards to follow a pattern favoured by the employers. 19/

A third contributing factor in the decline of the Railway Labor Act was the practice of frequent post-board intervention by government. Just as the automatic appointment of a board insulated the parties from the adverse consequences of a failure to settle the dispute in direct negotiation, so too did post-board procedures insulate them from the consequences of rejecting the board's recommendations. In this respect, the famous work rules dispute has been instructive. In 1955, an Emergency Board recommended the appointment of a special fact-finding body to investigate the railroad industry's wage structure. In due course a Presidential Railroad Commission was appointed which held hearings and made extensive recommendations, some of which affected traditional work practices, especially the use of firemen on diesels. Following its report in 1961 (which was not legally binding) a strike occurred on the work rules issue and another emergency board was appointed to review the problem. Finally, in 1963 the parties were statutorily compelled to submit their differences to binding arbitration, a process which in due course yielded a rich crop of post-award litigation. 20/ The lack of finality in this process is perhaps understandable due to the fact that the issue was so critical for the future of railroad unions and their members. But surely a direct confrontation between the parties would have resulted in a final, or at least long-run, solution to the dispute that has proved so disruptive of labour relations in the industry.

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Before leaving this examination of the Railway Labor Act, some mention must be made of its application to airlines. Apparently there has been an increasing tendency to resort to Emergency Boards, as with railways. 21/ To the extent that collective bargaining has been carried on airline-by-airline, this tendency seems entirely unwarranted because of the fact that an interruption of service is most unlikely to constitute an emergency. Most major centres are served by more than one line and in almost all cases alternative modes of transportation are available. However, as the 1966 strike against five major airlines showed, the crisis proportions of a dispute are obviously enhanced by the practice of multi-employer bargaining. 22/ Moreover, the course of the 1966 dispute may presage a new, and unhappy, era in airline labour relations. Presidential mediation of the dispute resulted in agreement but the membership of the striking union refused to accept the terms. Finally the dispute was settled only by the threat of congressional action to outlaw the strike and to compel arbitration.

In conclusion, it can only be said that the Railway Labor Act is conceded to have outlived its usefulness, at least in its present form. Virtually no authority can be found for the proposition that it represents a formula that can usefully be followed either in general legislation or in other specific industries.

2. The Taft-Hartley Act

The principle legislation, which governs all emergency labour disputes within federal jurisdiction (except those under the Railway Labor Act) is the Taft-Hartley Act of 1947. 23/ Passed as a reaction to a serious wave of strikes at the end of World War II, the legislation was bitterly condemned on ideological grounds by both unionists and non-labour proponents of free

collective bargaining. As will be seen, its emergency disputes provisions are today impugned on the more pragmatic basis that they contribute little to the resolution of labour disputes in key industries.

The scheme of the legislation, in so far as it affects emergency disputes, is as follows: 24/

(1) Where the President believes that a threatened or existing labour dispute "will, if permitted to occur or to continue, imperil the national health or safety", he may appoint a board of inquiry.

(2) The board is required to investigate the issues in dispute and the position of the parties, and to report to the President, but it is forbidden to make any recommendations.

(3) The President may then seek an injunction against the strike for a period of 60 days, during which the Federal Mediation and Conciliation Service assists the parties in resolving the dispute.

(4) If these efforts prove unsuccessful, the board of inquiry is reconvened and, once again, reports on the status of the dispute without making recommendations.

(5) The National Labor Relations Board then conducts a vote of the employees to determine whether they will accept the employer's last offer, as ascertained by the board of inquiry.

(6) By this time, 80 days will have elapsed since the injunction was granted and if the employees have rejected the employer's last offer, they are legally free to strike; the injunction then automatically lapses.

(7) Finally, the President may submit a report to Congress, with or without recommendations for legislative action.

Appendix E sets forth the experience under the Taft-Hartley Act from 1947 to 1963. (It has been invoked on five further occasions between 1963 and 1967). 25/ Except for the period immediately following its passage in 1947-48, the Act has been invoked once or twice a year on the average. In 8 of the 28 cases under the Act, a strike has occurred following the dissolution of the 80-day injunction; all 8 cases involved the maritime or longshoring industries. Although, as one scholar has stated, "...the Taft-Hartley procedures—despite their technical flaws—have worked out better than might well have been expected" 26/, each specific feature of the legislation has been widely criticized:

(1) To define emergency disputes, as has been pointed out, is virtually impossible in any event, but the exercise is advanced very little by the words of the statute. One author characterizes the "national health or safety" test as "too elastic" a phrase 27/; two others point to the failure to distinguish between inconvenience and emergency 28/; and a fourth suggests that a labour dispute could never, in fact, endanger national health or safety. 29/

(2) Assigning the task of triggering the mechanism of the Act to the President invites "politicalization" of the dispute. 30/ Since the aim of the statute presumably is to "prevent the emergency from ripening into a disaster" 31/, it follows that a party seeking intervention

will attempt to show how disaster is in fact inevitable if not imminent. Thus, an atmosphere of artificial crisis is generated so that the "emergency" becomes a political one for the President rather than an economic one for the country. 32/ As one author capsulized the matter "...the country usually finds there is an emergency whenever John L. Lewis is involved in a dispute." 33/

(3) The board of inquiry can be appointed only after an emergency arises; no provision is made for preventative intervention. 34/

(4) Once the procedure is set in motion there is really no way of adapting it to the problems of particular industries or the tactical exigencies of particular situations. 35/

(5) The prohibition against the making of recommendations by the board of inquiry deprives it of a potentially useful technique of mediation—the ability to assign responsibility for a failure to agree. Moreover, it lacks the prestige of a cabinet-level mediator. 36/

(6) The 80-day injunction does nothing, per se, towards solving the conflict; it may simply postpone the day on which the parties have to become more realistic in bargaining because they are confronting the possibility of a strike. 37/

(7) The public nature of the board of inquiry forces the parties to adopt hard positions in public which are difficult to retreat from. 38/

(8) The final offer vote deflects attention from the bargaining table, forces the employees to ballot on a complex of issues

to which a simple yes-no answer may be impossible, and in any event almost always culminates with a majority in favour of a strike. In the long run it proves nothing. Moreover, the final offer vote is time-consuming and thus further postpones settlement. 39/

(9) The President very seldom has sought congressional action after the other procedures contemplated by the Act were exhausted 40/, although some strikes have ensued.

Overall judgments regarding the Taft-Hartley Act range from the mildly favourable to the highly condemnatory. The former position is typified by the following statement:

> On balance, the much abused Taft-Hartley provisions have managed, so far, to protect the country from real or lasting damage without infringing too severely on the right of labour and management to disagree on issues. 41/

The latter position, which seems to be the majority view amongst informed observers, is summarized by Professor Benjamin Aaron. The Taft-Hartley Act, he has said, "...is virtually useless in preventing strikes and has contributed little to their settlement". 42/ Reflecting this dissatisfaction with the present legislation, virtually every leading industrial relations expert has advanced elaborate proposals for amendment of Taft-Hartley or for its replacement by new legislation. The roll call of those who vote "nay" on the present Act (though with differing degrees of vehemence) include Messrs. Aaron, Cox, Dunlop, Taylor, Bernstein, Northrup, Chamberlain and Wirtz, all of whom have written and worked widely in the field.

In broad terms, the common themes running through their criticism are that collective bargaining is the best way to resolve disputes, that the

impact of a strike in key industries is exaggerated so that we are overly concerned with preventing conflict, and that the preventative measures adopted do little to ease, and may actually exacerbate, labour-management relations.

3. Permanent Non-Statutory Procedures

Taft-Hartley procedures apply to disputes affecting national defence and security and have been invoked several times in such disputes (see Appendix E). However, at atomic energy installations and missile sites special peacekeeping procedures have been established on a tripartite extralegal basis.

Since 1949, an Atomic Labor-Management Relations Panel has helped to reduce labour strife in that sensitive industry, although since 1953 the parties have not actually promised to refrain from strikes and lockouts. While it has undoubtedly served a purpose, there is some opinion that the panel has outlived its usefulness and that its functions could better be discharged by the official mediation agency, the Federal Mediation and Conciliation Service. This view seems to be based on a judgment that too frequent invocation of the panel's services has adversely affected collective bargaining between the parties. 43/

The Missile Sites Labor Commission, established by presidential order in 1961, appears to have brought some stability to the strike-prone missile construction and operation programmes. Operating with the possibility of congressional anti-strike action as a spur to "voluntary" action, the Commission has reduced strike losses to a considerable degree. However, some critics appear to feel that labour peace has been purchased at a high price,

including extravagant wages and an objectionable sacrifice of principle. 44/ The Commission was abolished in 1967.

In terms of the implications of these two experiments, one distinquished commentator suggests that they:

> ...show that the best settlement procedures are those devised by management and labour for their own industry, taking into account its peculiar background, technology, customs and needs. 45/

This fairly modest claim can be accepted. However, it is questionable as to whether the informal non-binding handling of disputes by an extralegal panel is a generally acceptable method of peacekeeping in essential industries. It must be remembered that atomic energy and missiles are particularly sensitive areas in the United States because of their international and domestic political significance; consequently, the likelihood of anti-strike legislation is reasonably great. Thus, the willingness of the parties to develop voluntary procedures is prompted both by patriotism and by fear of binding statutory machinery. Finally, the heavy financial involvement of government, especially in missiles, may lead employers to adopt a more compromising posture because the cost of concessions can be passed along to the public under cost-plus contracts.

4. Federal Ad Hoc Legislative and Executive Action

Perhaps the most effective feature of federal ad hoc legislation is that it is so frequently proposed, so universally feared by disputing parties, and yet so seldom enacted. In 1963, it is true, the railway work rules dispute was statutorily remitted to arbitration, and in 1966 and 1967 other ad hoc legislation was forestalled only by a last-minute private settlement. But apart from a few other contemporary crises in which legislation was avoided

at the last minute by the capitulation of one party, the last major use of ad hoc federal legislation was in 1917. By the Adamson Act of that year, an eight-hour day was introduced into the railroad industry, thus ending a prolonged strike. 46/ There is abundant opinion in favour of more frequent resort to ad hoc legislation as an effective way of framing anti-strike measures in a manner appropriate to the circumstances of the particular case. 47/ As one proponent of this position makes his case:

> There are no answers to problems of national emergencies or catastrophies than can be given in terms of anticipatory legislation. 48/

The difficulties, of course, are those indigenous to any legislative exercise: political pressures, time for deliberation, procedural hurdles to be surmounted and, too often, a lack of either perspective or expertise within the legislative body.

The most dramatic form of executive intervention that has been used to end essential industry disputes is seizure of the enterprise. Appendix F shows the experience with this device.

During wartime, and immediately thereafter, power to effect seizure was conferred upon the federal executive by the War Labor Disputes Act, which also specifically outlawed work stoppages in the seized operation. Injunctions were issued, notably against the United Mine Workers, for violation of this prohibition. 50/ However, this sweeping potential for seizure ended with the repeal of the wartime legislation. By a 1952 landmark decision, the United States Supreme Court invalidated President Truman's seizure of the steel industry. The legal basis of the seizure was not statutory, but rather an executive order, issued in purported exercise of the President's powers as

commander-in-chief, to maintain defence production during the Korean War. 51/ While the case turns on the legal issue of the limits of executive action, implicitly the Court may be taken to have reviewed and rejected a presidential decision that a national emergency would be caused by a steel strike. As has been pointed out, neither civilian nor military production was materially disrupted. Since this time, the federal government has not engaged in seizure, although many experts appear to feel that statutorily authorized seizure procedures would be a useful peacekeeping device. 52/

For Canadian purposes, in any event, this device can be considered apart from any constitutional issues in order to assess its potential impact. Clearly there is much to recommend it on purely pragmatic grounds. Most obviously, it adds another option to the list of possible government peacekeeping measures and thus increases the uncertainty that is said to be a factor in producing a voluntary settlement. Equally, it is important because it can be coupled with other procedures (including negotiation and mediation) which may produce a substantive settlement.

In addition, seizure itself may generate pressures for settlement. If government "expropriates" the profits of the seized enterprise, the loss to management will be an incentive to agree to a settlement of the dispute and thus to secure an end to the seizure. Moreover, if government uses its control of the enterprise to negotiate a contract with the union, the after-effects of seizure may be costly to management. For both of these reasons, management will wish to avoid seizure. Seizure generates pressures on the union as well. In the United States (although not in Canada) public servants are forbidden to strike, so that the effect of seizure is to out-law the work stoppage and to maintain the status quo in employment conditions, at least

until the government-appointed managers agree to changes. Quite apart from the legality of the matter, it is obvious that the government itself is likely to be a more formidable opponent than the ousted private management.

In fact, it seems that seizure has been employed at the federal level quite even-handedly to force either labour or management capitulation in actual or potential conflict situations. As might be expected, it has been used in industries that are considered critical to national security (such as aircraft and shipbuilding facilities) or to the national economy (such as railroads, communications, steel and coal). By and large, seizure has involved a fairly short period of government control—generally less than six months—often exercised by military or defence-related agencies. 53/

In the light of its wartime connotations and of the 1952 steel decision, the likelihood of future non-statutory peacetime seizure seems remote. However, sanctified by statute and bolstered by appropriate constitutional safeguards, the device seems a useful one.

Another important executive device for handling essential industry disputes is the appointment of a fact-finding or investigative body. 54/ As has been noted, provision is made in both the Railway Labor Act and the Taft-Hartley Act for fact-finding, but extralegal procedures are often resorted to for three reasons. First, the statutory fact-finding boards can only be invoked as part of an elaborate mechanism that leads ultimately, in the case of Taft-Hartley, to an 80-day injunction; second, Taft-Hartley forbids such a board to make recommendations; third, the matter being investigated may require a broad investigation involving not merely the facts of a particular dispute but a full analysis of problems in the industry.

The fact-finding board, like seizure, may operate as a preliminary to other measures: for example, the ad hoc non-statutory Presidential Railroad Commission that investigated the complex work rules controversy reported in 1962. In 1963, when it had become clear that the parties could not work out their own solutions, the matter was sent to arbitration. However, fact-finding is usually intended to operate as a technique of settling the dispute rather than simply setting the stage for further legislative or executive action.

In this respect, the fact-finding body performs several useful functions. First, it may operate in a mediatory fashion, developing a possible acceptable settlement and winning the parties' consent to it. Next, if the parties are unwilling to compromise, the board may, by a published report, bring pressure to bear on the recalcitrant party (or, sometimes, on both parties). Where government is involved, as for example in the defence production and atomic energy fields, the report may well lead to official action which creates a better environment for settlement. Similarly, if direct intervention by government is ultimately needed to put an end to a work stoppage, a fact-finding report may make such action less risky as a political matter. Finally, there are some cases (probably very few) in which there is a genuine lack of knowledge about the facts underlying the dispute. The report may fill the void.

Yet even here there are risks. It has been persuasively argued 55/ that the fact-finding may drive the parties to take hard positions in public from which they cannot easily retreat; that the hearings of the board become a theatrical performance designed not to enlighten the public but to win public sympathy; and that the parties manoeuvre to obtain a favourable report

rather than explore areas of settlement. Finally, the effectiveness of public opinion as a catalyst to settlement has been questioned. 56/ The issues may be too complex for the public to grasp and there may be no way in which the public can express its displeasure with one or other of the parties in a tangible way.

In the final analysis, the public probably is unconcerned with the merits of the dispute and wants only a peaceful, orderly settlement. Seldom does a fact-finding body succeed in doing more than generate pressure on government decision-makers in favour of settlement, pressure that would exist without the fact-finding body having been appointed. 57/

But despite these criticisms, the fact-finding board remains an attractive option for a government anxious to intervene in a key dispute but reluctant to use compulsion to enforce a settlement. Fairly recent examples of its use include the Presidential Railroad Commission (appointed by President Eisenhower), a threatened strike in the aerospace industry in 1962, in longshoring in 1963, and in the airlines strike of 1966. At the state level, the fact-finding process has been institutionalized: its success will be evaluated below.

Finally, there must be considered the practice of high level mediation by the President, his cabinet officers, or ad hoc appointees acting on his behalf. In addition to the conventional techniques of persuasion and conciliation, a range of coercive tactics are available to mediators acting under direct Presidential authority. 58/ For example, in 1956 President Eisenhower's Secretary of the Treasury, George M. Humphrey, used his obvious prestige in the business community to "sell" a settlement in the steel industry, a performance repeated by Vice-President Nixon in 1959. More directly,

the Kennedy administration appears to have used its power to allocate government contracts as a technique of winning concessions, especially in the aerospace industry. A promise to consider tax concessions was used by President Johnson in 1964 to win the support of railroads for a wage increase, thereby avoiding a rail strike. On the other side, unions were pressured into calling off the 1965 longshoring strike by the threat of National Labor Relations Board (N.L.R.B.) legal proceedings and accepting a steel industry settlement in 1965 by the withdrawal of presidential support for a desired amendment of union security legislation. During the 1966 airlines strike, a direct presidential appeal for union ratification of a settlement was rejected and only the threat of a compulsory arbitration law, coupled with intense political pressure, finally ended the prolonged walkout.

On this last point, the obvious distinction between the United States and Canadian legislative systems becomes highly material. Unlike the Prime Minister in a parliamentary system, the President of the United States does not necessarily enjoy even a nominal majority in one or both houses of Congress. He cannot automatically (or even necessarily) make good a threat to secure legislation. Conversely, he has only his veto power (and his political influence) to forestall independent congressional action. Thus, there is a much greater likelihood of partisan political controversy in the United States over any proposed strike-ending legislation, which in turn reduces the credibility of a presidential threat to resort to statutory solutions if the parties cannot settle without them.

C. State Legislation

While constitutional decisions, especially the 1951 Wisconsin Transit case 59/, have confined state legislation to a fairly narrow range of

industries, state experience covers a wide variety of experiments in peace-keeping in critical employment situations. While some of these experiments antedated the Wisconsin Transit case, and were aborted by it, their results are nonetheless instructive. This function of the states as "social laboratories" is, of course, one of the strong arguments in favour of the decentralization of power in a federal system. 60/

Constitutional considerations aside, however, there are strong advocates of state abstention from essential industry dispute legislation. Foremost amongst these is David L. Cole, a prominent mediator. In a 1954 report to the Governor of New Jersey, Cole recommended repeal of a 1946 statute that had outlawed public utility strikes. 61/ His reasons may be summarized as follows:

(1) collective bargaining is an essential, indeed primary, element of industrial relations policy;
(2) the most successful restraints on the parties' freedom of economic action are those devised and voluntarily assumed by the parties themselves;
(3) no-strike and compulsory arbitration laws adversely affect collective bargaining;
(4) these laws have not in fact reduced the number of strikes or strike threats;
(5) contrary to all predictions, a public utility strike has never actually created a genuine paralyzing emergency;
(6) the parties should be obliged to assume the social responsibility of creating their own solutions;
(7) government's most useful contribution would be to provide highly skilled mediators and thereby to help the parties avoid crises.

The Cole position has not prevailed. Whether because of a disagreement over the primacy of collective bargaining, or because of a different assessment of the actual or probable impact of essential industry strikes, or simply in response to public clamour, a great many states have passed legislation that outlaws or postpones strikes. This legislation must now be considered.

1. Choice of Procedures 62/

The Massachusetts "choice of procedures" statute, drafted and later revised by the late Sumner H. Slichter, is generally conceded to be a model statute, worthy of emulation, or at least adaptation, on the national level. 63/

The statute applies to labour disputes affecting "the production and distribution of food, fuel, water, electric light and power, gas, or hospital or medical services", and the unique situation of the ferry that connects the island of Martha's Vineyard to the mainland. This list deliberately excludes transit systems and telephone services on the ground that work stoppages in those industries would not actually imperil public health or safety. Indeed, before the statute can be invoked, the governor is required to afford the disputing parties a hearing on the sole issue of whether "an interruption is imminent and would curtail the availability of essential goods or services to such an extent as to endanger the health or safety of the community."

The unique feature of the so-called Slichter law is not the careful definition of its coverage, but rather the flexibility afforded to the governor of the state in his ability to respond to a labour crisis. This flexibility is designed both to enable the governor to select the most effective option in the particular circumstances and to keep the parties uncertain as to what his choice will be. Because they are uncertain, they will be unable

to rely upon predictable government action in planning their strike strategy and will thus be prompted to settle their differences through negotiation.

Initially, the governor has several options that can be used alternately or in sequence:

(1) Do nothing.

(2) Require the parties to show cause before a moderator, appointed by the governor, as to why they should not arbitrate their differences; pending the moderator's decision, there can be no change in working conditions. The moderator may also act as a mediator. However, there is no power to compel arbitration except by the moral force of the moderator's report.

(3) Request the parties to voluntarily submit their dispute to an emergency board with power to recommend terms of settlement. If they agree to do so, the status quo is preserved until ten days have expired from the completion of the board's proceedings. They need not accept its recommendations and, if they do not do so, the board is simply discharged.

Assuming that the dispute remains unresolved, the governor may then enter into arrangements with the parties in order to secure the partial operation of the enterprise so as to avoid a risk to the public health and safety in the event of a strike.

Finally, the governor is empowered to seize and operate any enterprise in the enumerated industries in order to protect the community, in accordance with the following provisions:

(1) The owner of the seized enterprise is entitled to receive, at his option, either the proceeds of operation or "fair compensation", thus avoiding a constitutional prohibition against the taking of property without compensation.

(2) If terms of settlement have been recommended by an emergency board at the earlier stage, the governor may implement these during seizure.

(3) If there has been no board, the governor may appoint one to make recommendations concerning conditions of employment during seizure.

(4) Seizure is terminated when the dispute is settled or when, in the opinion of the governor, there is no need to prolong it.

(5) During seizure, work stoppages are illegal.

Table 4-1 records the very limited experience under the Slichter law. Perhaps most striking is the fact that it has not been invoked since 1953, although several stoppages have taken place since then in industries covered by the law. For example, in 1960 the Martha's Vineyard ferry service was interrupted by a lengthy strike but the law was not invoked, although it had been specifically amended in 1954 to cover this very facility. To some extent, doubts as to the constitutional validity of such state legislation, dating from the early 1950's, may explain the failure to invoke the law. But even in the period prior to 1953, the law was administered with restraint and was not automatically brought into play in every crisis.

It has been suggested that wise and economical administration of the law, as much as its provisions, has been the secret of its success. Credit

TABLE 4-1

EXPERIENCE UNDER THE SLICHTER LAW

COMPANY	UNION	Dates of Initial Proclamation and Final Settlement	PROCEDURES USED	METHOD OF FINAL SETTLEMENT
Truckers Association	Teamster, Local 25 (AFL)	January 1, 1948 February 4, 1948	Moderator Mutual agreement for partial operation	Collective bargaining
Eastern Gas and Fuel Associates (gas manufacturing plant that serves Boston area and is part of large utility organization)	Gas, Coke and Chemical Workers (CIO)	January 30, 1948 February 17, 1948	Moderator Seizure	Collective Bargaining
N.E. Electric System (gas distribution facilities	United Mine Workers District No. 50	February 17, 1953 March 5, 1953	Moderator	Collective Bargaining
Worcester Gas Light Company (subsidiary of New England Gas and Electric Association)	United Mine Workers District No. 50	March 1, 1953 May 11, 1953	Moderator Seizure	Collective Bargaining
Montaup Electric Company (electric power generating and transmitting subsidiary of Eastern Utilities Associates)	Utility Workers of America (CIO)	June 25, 1953 September 9, 1953	Moderator Emergency arbitration board (held no hearings on merits of dispute)	Voluntary arbitration outside procedures of Slichter law (same arbitration board as appointed by governor but accepted by union only after it became private board).
Association of Milk Dealers (supplying less than half of Greater Boston's needs)	Teamsters, Milk Wagon Drivers Local (AFL)	April 9, 1953 December 23, 1953	Moderator Emergency arbitration board Seizure Special commission for recommendations (never issued recommendations)	Unanimous decision of tripartite voluntary arbitration board (same personnel as special commission)

SOURCE: George P. Shultz, "The Massachusetts Choice-of-Procedures Approach to Emergency Disputes", Industrial and Labor Relations Review Vol. X (April, 1957), p. 364.

must also be given to the parties who have managed to make collective bargaining work without creating frequent crises in essential industries. More to the point, the primary achievement of the Slichter law has been to provide the public with a margin of protection in potentially dangerous circumstances, while remaining sufficiently innocuous to permit uninhibited collective bargaining. Yet too much emphasis can be placed on the contribution of the law: other states in New England with no legislation at all have fared as well as Massachusetts.

As has been noted earlier, the basic notion of a choice-of-procedures statute has received substantial endorsation. That the first such statute has not been used for 15 years does not affect the intrinsic merit of this approach.

2. Compulsory Arbitration 64/

The only appreciable body of experience with compulsory arbitration of interest disputes in essential industries has taken place at the state, rather than the federal, level. Unfortunately, this experience spans a very brief period between 1947 and 1951. In the former year, eight states reacted to the postwar wave of utility strikes by creating a regime of compulsory arbitration under which such strikes would be forbidden. However, as has been discussed, the 1951 United States Supreme Court decision in the Wisconsin Transit case virtually emasculated state jurisdiction and most of these postwar arbitration statutes fell into disuse, were repealed, or were themselves struck down on constitutional grounds.

The paradigm statute was that of Indiana which covered privately-owned utilities, telephones, and transportation services other than rail and air.

A comparison of the coverage of the Indiana and other state statutes is found in Table 4-2. Under the Indiana statute, following a breakdown of negotiations and the unsuccessful intervention of a mediator, the governor was authorized to refer a dispute to arbitration if he believed that severe hardship to the public might occur. As from the appointment of the mediator, strikes and lockouts were forbidden. The other state statutes differed in various particulars.

These state laws set forth in some detail the mechanism of arbitration, including the method of appointing arbitrators, procedural powers enjoyed by them (see Table 4-3), and standards to be applied in making an adjudication (see Table 4-4). By way of generalization, it can be said that all of the statutes revealed a desire to "judicialize" the resolution of industrial conflict and it is precisely this tendency that must next be scrutinized.

Table 4-5 discloses the volume of compulsory arbitration actually undertaken from 1947 to 1962 in five states 65/, all of which in essence had Indiana-type legislation. 66/ Unfortunately, most of the data available relate to the arbitrations that were held and there has been little attempt to assess statistically the impact of compulsory arbitration upon voluntary settlements reached through direct negotiation or mediation. However, one study, relating to New Jersey, is extremely instructive on the point. 67/ Of about 100 disputes that arose under the New Jersey statute between 1947 and 1949, 19 were settled at the level of mediation, 9 required seizure of the enterprise (an intermediate step provided in New Jersey prior to arbitration) and fully 20 went to the terminal point of third-party adjudication. Thus, barely one-half of the disputes were settled by the direct efforts of the parties while almost 30% required such drastic governmental measures as seizure or compulsory arbitration.

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TABLE 4-2

COVERAGE BY INDUSTRY AND SERVICE OF STATUTES
PROVIDING FOR COMPULSORY ARBITRATION

	STATES							
INDUSTRY OR SERVICE	Florida	Indiana	Kansas	Michigan	Nebraska	New Jersey	Pennsylvania	Wisconsin
Electric Light	X	X			X	X	X	X
Electric Power	X	X			X	X	X	X
Water	X	X			X	X	X	X
Gas	X	X			X	X	X	X
Heat and Fuel	X		Fuel Products		X	X	Steam heat	X
Telephone		X			X			
Telegraph					X			
Communication	X					X		Xa
Transportation	X	X		Xg	for hire	X		Xe
Hospitals				X				
Coal Mines			Mining of fuel Products					
Food Products			X					
Clothing			X					
Governmental Services					Xb			
Government owned enterprise	Excluded			Xc	X			
GENERAL TERM:								
Public Utilities			Xa	Xf				
Sewer or Sanitation						X		

a See the Laws of 1911. Chapter 238 Section 4, for enumeration of such public utilities, all of which are also included under this act.

b "Government service in a proprietary capacity..."

c "Including the county as employer...."

d Includes autobusses, bridge companies, canal companies, ferries and steamboats, pipeline companies, railroads, street railways, tunnel companies.

e Public passenger transportation or communication; not applicable to railroads.

f "Industry affected with a public interest including any public utility or hospital".

g Includes cartage and hauling.

SOURCE: Roberts, Compulsory Arbitration of Labour Disputes in Public Utilities, 1 Lab. Law J. 694 (1950).

TABLE 4-3

ARBITRATION MACHINERY

NUMBER OF ARBITRATORS	Florida	Indiana	Kansas	Michigan	Nebraska	New Jersey	Pennsylvania	Wisconsin
One								X
Three	X	X		X	a	X	X	
Plus non-voting:								
1 from each side		X					X	
SELECTION OF ARBITRATORS								
One from each side	X			X		X		
Third by selection of other two						X		
Third by appointment of Governor	X							
Any or all from a Panel		All three						
Entirely by appointment					X		All three	X
Other Method				X				
Provision for compensation of arbitrators	X							X
TIME PERMITTED FOR ARBITRATION PROCESS:			b					
Originally: 15 days						X		
30 days					X			X
60 days	X	X					X	
ADDITIONAL EXTENSIONS:								
30 days	X							X
60 days		X					X	
Other						X		
DESIGNATED AUTHORITY OF ARBITRATORS:								
Compel attendance of parties	X	X	X	X	X		X	X
Order Information	X	X	X		X		X	X
Receive evidence (and/or take testimony)			X	X	X			
Administer oaths	X	X			X		X	X
Subpoena witnesses	X	X	X	X	X		X	X
Hold public hearings			X	X	X	X		X
Provision for review	X	X	X		X	X	X	X
Mention of penalties			X	X	X	X	X	

a Judges

b In Kansas this act endows the Commission of Labour with the authority formerly delegated to a court of industrial relations.

SOURCE: Roberts, Compulsory Arbitration of Labour Disputes in Public Utilities, 1 Lab. Law J. 694 (1950).

TABLE 4-4

STANDARDS FOR ARBITRATORS IN STATE ARBITRATION LAWS

CRITERION	INDIANA TYPE	NEW JERSEY	MASSACHUSETTS
Public Interest.....		1. The interests and welfare of the public.	
Comparative wage rate and conditions of employment....	1. Wages paid and conditions of employment maintained for similar work and skills under similar conditions by like public utility employees in same or adjoining labour market areas.	2. Comparison of wages, hours, and employment condition in same or comparable work, with due consideration to factors peculiar to industry.	1. The conditions in existence in the industry affected.
	2. Relationship to wages and employment conditions maintained by all other employers in same labour market areas.	3. Comparison of wages, hours, and conditions of employment as reflected in industries generally and in public utilities throughout nation and in New Jersey.	2. Consistent with existing agreements between the parties.
	3. Labour market and adjoining labour market areas to be defined by boards of arbitration upon evidence presented.		
	4. If an employer has different plants in different labour market areas, separate rates and conditions shall be established for each labour market area.		
Fringes and employment security.....	5. In setting wage rates, over-all compensation, including all fringe benefits, and employment security measures shall be considered.	4. Security and tenure of employment with due consideration of effect of technological development on such security and of any unique skills and attributes developed in industry.	

* Indiana, Florida, Pennsylvania, Nebraska, and Wisconsin.

SOURCE: Northrup and Bloom, Government and Labor

TABLE 4-5

ARBITRATION CASES BY STATE AND INDUSTRY 1947[a]-1962

STATE	TOTAL CASES	URBAN TRANSIT	COMMUNI-CATION	ELECTRIC LIGHT AND POWER[b]	GAS	WATER WORKS
Florida	4	3			1	
Indiana	29	14	8	6		1
New Jersey	25	3	9	3	9	1
Pennsylvania	9	(c)	(c)	3	6	
Wisconsin	40	2	10	24	4	-
TOTAL CASES	107	22	27	36	20	2

a All laws enacted in 1947; all statistics from dates of enactment.

b Includes gas utilities operated in conjunction with electric light and power.

c Jurisdiction of Pennsylvania law does not include these industries.

Data on usage follows those set forth in New Jersey Governor's Committee on Legislation, Report to Governor B. Meyner, pp. 33-40, except for Pennsylvania, where records of the State Labor Relations Board show two additional cases.

SOURCE: Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes at p. 219 (1966).

On the other side of the ledger from this rather dismal record are certain explanatory facts. 68/ First, the New Jersey situation was complicated by fierce inter-union rivalry in the gas industry, which accounted for almost one-third of the arbitration cases. Second, Wisconsin, which also invoked arbitration frequently, had to cope with a special controversy over the issue of whether rural electric co-operatives should meet the wages paid by large private utilities. This accounts in part for the fairly large number of arbitrations in Wisconsin shown in Table 4-5.

Two states shown on Table 4-5 have had relatively little experience with their arbitration legislation although Florida may have used it least because of the relative weakness of unionism in that state. Of all of the states, Pennsylvania alone seems to have made a genuine effort to minimize resort to arbitration by restricting the coverage of the statute and by the frequent exercise of executive discretion against compelling arbitration.

While the figures are something less than compelling, the evaluation of these state statutes by expert observers is almost unanimously unfavourable.

For example, Northrup and Rowan point out that compulsory arbitration has had relatively little impact on collective bargaining in those areas that most directly affect public health and safety because the parties, without compulsion of law, had already recognized the need to avoid strikes and had done so. They concluded:

> (L)egislation aimed at preventing strikes may in itself either cause disputes, or cause machinery designed to prevent stoppages in essential industries to become enmeshed in the settlement of labor-management disputes that the parties could and should settle themselves. 69/

These two themes reappear constantly in the literature: (1) there is no factual record of labour and management behaving so irresponsibly as to have actually endangered public health and safety, and (2) compulsory arbitration adversely affects collective bargaining. 70/ To some extent, these generalizations are supported by evidence but the case is certainly not clear beyond doubt. One of the most perceptive of labour relations observers records his views this way:

> It is possible to be persuaded in one's own mind that compulsory arbitration is wrong, and yet to feel at the same time real doubt as to the roots of the conclusions. 71/

Simply to expose "the roots of the conclusions", the following are some of the more common arguments for and against compulsory arbitration, presented in tabular form:

For compulsory arbitration 72/	Against compulsory arbitration
- the public health and safety should be protected against injury caused by work stoppages.	- the public is seldom, if ever, actually injured. - work stoppages are not avoided simply by being outlawed.
- arbitration will prevent extravagent wage claims, uneconomic work practices.	- wages should not be regulated unless prices and profits are also subjected to compulsory arbitration.
- in many essential industries (utilities, hospitals) rates are regulated or operations are subsidized by taxes; wages in these industries should likewise be regulated.	- the regulatory agency (or government) will in effect set wages by fixing rates; the workers will have to subsidize the public through low wages. - management may be too prone to make concessions to the union if they can be recouped from the public through a rate increase.

For compulsory arbitration 72/	Against compulsory arbitration
- arbitration can be made sufficiently unattractive that the parties will be induced to avoid it by negotiating their differences.	- the parties will prepare for arbitration rather than attempt to settle their differences; they will take polar positions, refuse to abandon minor demands.
- although absolute objectivity is impossible, a rational weighing of a variety of factors will produce a fair result, as it does in other kinds of proceedings (e.g. expropriation, rate-setting).	- there are no acceptable standards by which to decide cases. - no stranger is as competent as the parties to create workable solutions for their relationship, especially as to non-monetary matters.

A more complete analysis of the practicality and desirability of compulsory arbitration will be undertaken below, but at this point it must be stressed that the onus of proving that essential industry disputes should be resolved by compulsory arbitration clearly rests upon its proponents. None of the United States state experience holds out high promise for its use.

3. Seizure 73/

In the United States, usage of the term "seizure" is a tactic by which the state assumes control of an enterprise to forestall or end a strike. This action can be an adjunct to other action, e.g., arbitration, or a separate and distinct technique of halting a work stoppage.

Maryland, New Jersey and Massachusetts have all used seizure as an adjunct to other dispute settlement techniques.

Maryland passed a Public Utilities Disputes Act in 1956 to deal with a prolonged transit strike in Baltimore, which provided for compulsory mediation and arbitration following seizure. In fact, the transit system was

seized and mediation proved unsuccessful. The employer then obtained an injunction against compulsory arbitration, which was the next step provided under the statute. However, before the validity of the statute could be tested in the appellate courts, the parties reached a settlement with the assistance of a federal mediator. The experience under the Maryland Act has been limited to this single instance and proves little.

New Jersey, on the other hand, has had much more experience with seizure under a 1946 statute which applied to heat, light, power, sanitation, transportation, communication, and water supplies and facilities. Initially the statute provided for a fact-finding board to make non-binding recommendations which, if rejected, would be followed by seizure. There were no penalties provided by the statute for strikes in defiance of the seizure order and a telephone dispute in 1947 pointed up this deficiency. The legislation was then amended to provide heavy penalties for post-seizure strikes and to establish a procedure for compulsory arbitration; subsequently the penalties were modified and the pre-seizure fact-finding procedure was abolished. The statute was employed about 25 times between 1947 and 1952 but has not since been invoked, presumably because of its questionable constitutionality. The reaction of both labour and management to the statute was generally hostile. Labour regarded the statute as a strike-breaking device, while management was much concerned that seizure might become more than a token gesture and result in active governmental control of the seized facility. The Cole report in 1954 recommended that the law be repealed on a number of grounds, but especially because it was both unnecessary and ineffective. 74/

The third state to combine seizure with other techniques of dispute settlement was Massachussetts, whose choice-of-procedures legislation has already been discussed.

Virginia and Missouri are the two states that have used seizure as an independent procedure to terminate work stoppages in essential industries. In Virginia, separate seizure statutes have been passed relating to ferries, mines, and public utilities, of which the latter is the most significant. The Public Utilities Labor Relations Act covers electric light and power, water, heat, gas, communications and transportation, although in fact it has only been invoked in urban transit (nine times) and telephones (twice). The Virginia statute makes no pretense at dispute settlement; even a pre-seizure mediation provision originally enacted in 1947 was repealed in 1954. The purpose of the Act is clearly to maintain service in order to protect the interest of the community. When, in the opinion of the governor, a threatened work stoppage would cause inconvenience or harm to the public, he may take possession of a public utility. Employees are then given the option of working or not working for the duration of the seizure, with no penalty provided for those who make the latter choice. However, strikes are forbidden and working conditions are frozen during seizure (which brings pressure to bear on the union), while 15% of the net profit is retained by the state as compensation for its services in operating the utility. In addition, the state is reimbursed for any out-of-pocket expense involved but does not bear any losses suffered during seizure. The net impact of these provisions has been summarized as follows:

> (T)he Virginia seizure laws appear to be well-considered legislation. They aim to afford the public protection but, at the same time, attempt minimum interference with collective bargaining by making the parties settle a dispute and by penalizing them during a seizure period. In a true sense, Virginia's laws are not "dispute-settlement" statutes, but rather threats to parties who do not settle. Certainly, they are not a substitute for collective bargaining, nor are they designed as such. 75/

Finally, the Missouri Public Utility Seizure (King-Thompson) Act must be considered. 76/ Its coverage is similar to the Virginia statute but there the resemblance ends. A preamble to the statute declares that "...the State's regulation of the labor relations affecting...public utilities is necessary to the public interest". When a labour dispute threatens, a fact-finding board is formed with power to recommend a settlement. If either party rejects its recommendations, the governor may seize the utility. In fact, the statute was invoked 29 times and in 20 instances the parties were able to settle the dispute prior to seizure. The statute does not provide for the maintenance of working conditions, nor does it stipulate that any part of the net profits shall be taken by the state. However, as to the latter point, the general position in United States law is that the owner of property taken for public purposes is entitled as of right to "just compensation". Another unique feature of the Missouri law is the severity of the penalties provided (and actually invoked on one occasion) against illegal strikes or lockouts following seizure. Employees who go on strike (or remain on strike) lose all job rights and may only return to work as new employees; the union and union officers are liable to substantial fines for calling a work stoppage; the utility is liable both to a fine, and ultimately, to loss of its franchise if it engages in a post-seizure lockout.

Three general issues relating to seizure must now be raised. First, there are problems which arise when the seized enterprise is subject to rate regulation. Such regulation is undertaken by an authority which is an arm of the government that is in control of the seized enterprise. An anomaly is thus created; one arm of the state in effect is obliged to deal with another. Again, if the regulatory body indicates its willingness to approve a rate increase (perhaps to meet the costs of a wage settlement) the parties

may be tempted to create situations in which seizure occurs. Both will ultimately benefit from the rate increase. On the other hand, if no application is made for a rate increase, there may simply be no way of settling the strike. The net result may be that peace is purchased by unwarranted impositions on the public. Second, what disadvantages can be attached to seizure in order to drive the parties towards voluntary settlement? Table 4-6 compares the various seizure statutes in terms of the burden placed upon employers and employees during seizure. The difficulty with fixed rules (which in the United States may be constitutionally required) is that they may not fit the particular case. For example, a utility that is not making a profit may have little to fear under the Virginia statute; a union confronted with an employer demand for changes in work rules may be quite content that working conditions should be frozen. Third, there is the practical problem of forcing employees to work. Even the King-Thompson Act of Missouri may not be effective in the face of a united work force. This was demonstrated during the 1966 New York subway strike when the state ultimately had to pass legislation authorizing the transit authority to reinstate strikers whose jobs had been declared forfeit under the New York Condon-Wadlin Act, whose punitive provisions were modelled on those of Missouri.

While some of these problems (especially the problem of securing compliance) are common to other types of dispute settlement procedures, seizure generally seems to be a useful device if independently invoked. 77/ However, in Canada the potential utility of seizure may be limited by two considerations:

(a) Government (federal, provincial and municipal) already owns many public utility, transportation, and communication services; there is no private employer to displace.

TABLE 4-6

STANDARDS GOVERNING PLANT OPERATION DURING SEIZURE BY STATES

STATE	WAGES AND CONDITIONS OF EMPLOYMENT	DISPOSITION OF BUSINESS PROFITS	APPLICABILITY OF LABOR AND SOCIAL LEGISLATION DURING PERIOD OF SEIZURE
Maryland	Seizure authorities shall put into effect recommendations of Board of Arbitration appointed pursuant to statute, and retroactive to date of last agreement where possible, provided that if a valid agreement exists, no action inconsistent with that agreement may be taken.	Plant operated for account of owner; or if owner elects, he may waive same and sue for just compensation, but courts must consider effect on compensation of fact that a labor dispute threatened to cut off production.	No state or federal law affecting health, safety, security, and employment standards shall be affected. All such laws must be complied with during state operation.
Massachusetts	Governor may alter upon recommendation of a tripartite board. All changes must be based on going industry practice and must be consistent with any existing agreements of parties.	Plant operated for account of owner; or if owner elects, he may waive same and sue for just compensation, but courts must consider effect on compensation of fact that a labor dispute threatened to cut off production.	No state or federal law affecting health, safety, security, and employment standards shall be affected. All such laws must be complied with during state operation.
Virginia	No changes permitted.	Cost to state of operation and 15 per cent of net profit paid to state; rest of profit to owner.	Nothing specific in law.
Missouri	"The Governor is authorized to prescribe the necessary rules and regulations...."	"The Governor is authorized to prescribe the necessary rules and regulations...."	Nothing specific in law.
New Jersey	"The Governor is authorized to prescribe the necessary rules and regulations...."	"The Governor is authorized to prescribe the necessary rules and regulations...."	Nothing specific in law.

SOURCE: Northrup and Bloom, Government and Labor at p. 441 (1963).

(b) Strikes by public employees are not themselves unlawful as they are thought to be in the United States. 78/ Specific prohibitions against strikes in the seized enterprise would therefore be required.

4. Strike Notices and Votes 79/

A number of states require the giving of notice prior to a strike in essential industries, presumably so that the government can intervene in order to bring the parties together. However, the dubious utility of the strike notice for this purpose, or for the purpose of establishing a "cooling-off" period, has been frustrated by a simple expedient. The union routinely gives notice of its intention to strike and enters negotiations with this technicality cleared away. The device is virtually useless as a technique of preventing or settling strikes.

Almost equally unhelpful is the statutory requirement of a strike vote which has been established in seven states 80/ as a condition precedent to a strike. These laws were declared inapplicable to interstate commerce 81/ and have since been largely inoperative. However, experience under these laws while they did operate suggests that they have little to recommend them. For example, in a period of about two years in Missouri, strikes were authorized in over 85% of the votes held; in Michigan in a seven-year period strikes were authorized in over 80% of the votes. Similarly, a provision in the Pennsylvania Utility Arbitration Act which provided for a ballot on acceptance of the employer's last offer produced nine rejections and only one acceptance—and that the day before the Korean War wages freeze. 82/ On the other hand, in Missouri only 5% of the authorized strikes actually took place (no figures are available for Michigan) which suggests that the vote—like the strike notice—becomes a routine formality of bargaining.

While there can be little objection in principle to the holding of a secret ballot vote on the important issue of whether a work stoppage will occur, in practice little is gained. A union that does not enjoy the support of a substantial majority of the employees is indeed foolish in calling a strike. For this reason, without compulsion of law, many unions do conduct strike votes. Those who do not do so, and who call strikes that have little support, may well be penalized by a humiliating defeat. On the other hand, even a vote in favour of a strike can be seen as a mere gesture to impress the employer with little risk to the union and its members. At the critical moment when the strike actually begins, worker sentiment is again tested and the employees "vote with their feet".

5. Investigation and Fact-Finding 83/

Almost 30 states provide for fact-finding, investigation, conciliation or mediation, terms used to describe a variety of settlement-inducing procedures which operate as an adjunct to, and an extension of, the collective bargaining process. In its "pure" form, fact-finding was designed to secure an impartial investigation of the issues in dispute and recommendations for a fair settlement. In practice, there has been a tendency to develop, and to "sell" to the parties, acceptable formulae for agreement without regard to its fairness and without particular concern for ascertaining "facts".

In some states (discussed supra) fact-finding is merely a prelude to more authoritative intervention such as seizure or arbitration; in most it is the only form of governmental action provided. For the most part, these fact-finding procedures are of general application to all disputes falling within the state's jurisdiction, but sometimes by legislative prescription, sometimes by administrative practice, fact-finding is reserved for essential

industry disputes. Appendix F contains a summary of state fact-finding legislation. Of course, there is also frequent resort to non-statutory ad hoc fact-finding or mediation procedures.

Several states deserve special scrutiny. Colorado, for example, was a pioneer in the field of fact-finding with the Compulsory Investigation Act of 1915, which actually was based on the 1907 Canadian Industrial Disputes Investigation Act. However, the fact-finding function in Colorado has seldom operated, except in the early years, and then largely in a mediatory rather than an investigative manner.

Minnesota has also had a rather long tradition of fact-finding going back to 1939. 84/ The Minnesota Labor Relations Act establishes a general code of labour-management relations. It provides for the intervention of a government conciliator in unresolved disputes. If he fails to effect a settlement, he recommends to the parties that they submit their dispute to arbitration. If this recommendation is rejected and if the industry is "affected with a public interest" 85/, the governor may appoint a tripartite commission to report on the issues involved and the merits of the positions taken by the parties. For the period of the commission's sittings and for a short period thereafter (30 days in all), work stoppages are forbidden. Thereafter, strikes are permitted.

Between 1940 and 1960 the procedure was invoked over 300 times, especially during wartime and in the immediate postwar years. By common consent, this frequent resort to fact-finding seriously impaired its effectiveness and since 1950 a conscious administrative policy of restraint has prevailed. As some measure of the statute's over-use, the industries identified as affected with a public interest included not only hospitals (2.3%), public

utilities (10%) and transportation (37%), but also a wide variety of non-essential industries including manufacturing operations of every kind, hotels and restaurants, and even laundries. Moreover, the normative significance of the commission's report has diminished in favour of a genuine mediation function. As one study suggests:

> (W)orkability and acceptability rather than abstract concepts of justice and equity are the guidelines followed. 86/

Predictably, then, there has been little effort to use public opinion as a means of coercing a recalcitrant party into making concessions.

Since the early 1950's, the Minnesota statute (like other state legislation) has been under a constitutional cloud. Rather than see it tested and invalidated in the courts, state officials have invoked fact-finding procedures only with the consent of both sides. Coupled with the policy decision to use it more sparingly to avoid dissipating its effect, this approach has enhanced its utility as a technique of mediation. Obviously, two parties who agree to fact-finding are at least partly committed to exploring possible areas of consensus.

New York has had a fact-finding statute since 1887, although its modern form dates from 1941. Following unsuccessful mediation, a board of inquiry may be appointed by the state Industrial Commissioner. In fact, this procedure has seldom been utilized—only six times between 1950 and 1960—and almost always when the parties themselves were seeking a way out of a prolonged or unpopular dispute. The extreme reluctance to appoint boards of inquiry seems to have been rewarded by a substantial record of success.

Massachusetts has perhaps gone the farthest of all the states in preserving the pristine concept of fact-finding as a means of mobilizing public

opinion in favour of, or against, labour or management in a particular dispute. The fact-finding board actually publishes a notice assigning responsibility for a strike. However, the notice tends to be so cryptic, the issues so complex, and the public so apathetic, that the pressure exerted on the "blameworthy" party is negligible. Indeed, as a matter of principle it is difficult to see what benchmarks are available to ascertain responsibility for a labour dispute. In any event, recent constitutional developments have probably almost eliminated the operation of this procedure.

While other fact-finding statutes could be analyzed, the pattern that emerges from the several states already reviewed suggests certain conclusions which are already familiar to Canadian observers of compulsory conciliation legislation:

(1) The value of fact-finding diminishes as its frequency increases. If used routinely, the report of the fact-finding body simply becomes a floor above which further negotiations are conducted.

(2) Labour disputes are seldom the result of misunderstanding of the facts. Clarifying the facts will seldom settle the dispute; occasionally it will exacerbate the dispute. Therefore, fact-finding boards tend to develop habits of mediation.

(3) Public opinion cannot easily be brought to bear on a recalcitrant party and in any event it is almost impossible to evaluate in comprehensible terms the relative merits of the positions in a collective bargaining dispute.

6. The Lessons of State Legislative Experience

A knowledgeable United States observer 87/ has made this general assessment of state legislation: frequently the rigidity of the procedure inhibits collective bargaining; the statutes themselves do not stop strikes; peaceful settlements are worked out by the parties without resort to the procedures provided (and in states that lack legislation); the statutes are sometimes invoked in a discriminatory fashion; compliance with no-strike provisions is difficult to enforce; in the final analysis, the quality of administration is more important than the content of the law. In sum, he concludes, these laws generally have no effect, and sometimes have a bad effect, on the peaceful settlement of labour disputes.

Perhaps a somewhat less sweeping condemnation is warranted. In the right industry, at the right time, and with wise administration, almost all of the devices examined have made some contribution to resolving labour disputes in essential industries at the state level.

The key problem is what standard should be used to measure the utility of these techniques of dispute settlement. In the view of many commentators (a view shared by the author) the bald statistic that no strikes have occurred is not by itself indicative of a properly functioning system. This test presupposes that without a statutory method of dispute settlement work stoppages would have occurred and that such stoppages would necessarily have harmed vital community interests. There are no hard facts to support these presuppositions and, indeed, the experience of states that have no such laws indicates that they may well be false. Finally, to focus exclusively on the absence of conflict is to avoid the necessary exercise of evaluating the quality of the peace. Assuming that labour disputes are settled by arbitration,

or by some less coercive device, on what terms are they settled? Are workers who are denied the right to strike thereby condemned to substandard wages and working conditions? Or is it simply impossible to answer these questions because there is no way to measure just and fair wage standards?

This last query suggests an alternative approach, one more consistent with the general regime of voluntarism in industrial relations and more favoured by the majority of learned commentators. Voluntarism is one of the primary values in our system of industrial relations, collective bargaining, and an important test of legislation is the degree to which it maximizes private settlement by labour and management of their differences.

The ambivalence of state legislators, caught between the need to satisfy a public demand for protection against strikes and the irrefutable claims of the parties to the right to engage in collective bargaining, has often led to statutory compromises. These compromises, in turn, have tended to make collective bargaining less effective and thus to create for the public the very risks of conflict that legislation was intended to avoid.

The United States experience has been summarized and evaluated by Northrup and Bloom, who have worked extensively (if sometimes dogmatically) in the area of essential industry disputes:

> When the right to strike or to lock out is withdrawn, as through strike control or emergency legislation, the inducement to agree declines sharply. If the parties are not faced with the consequences of refusing to settle, their desire, determination, or even ability to settle dwindles. This has occurred under each and every law or procedure, federal and state, legal and extralegal, which has been in existence. No strike control law or extralegal method has succeeded in avoiding this pitfall.
>
> The result is not strike control, but settlement avoidance. Fearing that to settle will mean a less attractive "package", that it will be a sign of weakness, or that it will involve criticism from

rivals or fellow officers or managers, unions and companies soon prepare for the emergency procedure instead of for collective bargaining and settlement. The aim is to force intervention - to create the emergency. The more adamant, obdurate, and intransigent the parties, the higher is likely to be the return from public intervenors who see as their principal job the task of ending the strike - of avoiding the emergency. With headlines screaming and merchants complaining about business effects, the pay-off is likely to be greatest to those most willing to fight for more and most willing to create more and greater emergencies.

Emergency dispute laws thus create their own rationale. Behavior becomes tailored to the laws. The more laws enacted, the more "emergencies" are created, and the more "necessary" become the laws. Even laws which provide no direct settlement procedure - for example, the Virginia Public Utility Labor Relations Act, or a sophisticated statute like the Massachusetts choice-of-procedures (Slichter) law - have followed this pattern. This raises the question whether such laws are more harmful than helpful - indeed, whether emergency legislation is necessary. 88/

D. Other Novel United States Proposals

Many proposals for the improvement of emergency disputes legislation in the United States involve modification of existing laws or adoption of some device (such as choice-of-procedures or compulsory arbitration), the implications of which have already been canvassed. There must now be examined certain other novel devices that have been proposed but not adopted at either the national or state level.

1. The Statutory Strike 89/

The statutory strike is a technique of resolving disputes through economic pressure on the parties without interruption of work. Its cutting edge is that production is continued on terms that impose a burden on both management and labour as, for example, by confiscating part of the profits of the enterprise and by prohibiting any alteration of wages until a settlement is reached. Strikes and lockouts are forbidden so that the public does not suffer.

A variant of this device, sometimes called the semi-strike, is typified by the experience of a 1960 Miami bus "strike". The strike consisted of a refusal by the drivers to collect fares although they continued to operate the buses without pay. On its part, the Miami Transit Company supplied fuel and maintained the buses. However, the drivers were found to be accepting "tips", thus mitigating their loss, and the arrangement was cancelled.

The way in which the statutory strike is to be conducted is obviously a matter for either legislative stipulation or (better) agreement in advance between the parties. As the Miami experience indicates, it probably should provide each side with some income, although less than usual.

The advantages and disadvantages of the statutory strike (or semi-strike) have been carefullly canvassed by Professor McCalmont. 90/ He points out that the semi-strikers do not run the risk of losing their jobs as a result of being replaced during the strike, that their financial loss during the strike may be only a fraction of their normal earnings (depending on the prior understanding between the parties), that there is less public hostility (because service has not been interrupted) and, consequently, less risk of new restrictive legislation. Similar advantages accrue to the employer. His loss during the strike would be partial rather than total and the continuation of normal service would reduce the likelihood of a post-strike decline in business due to a change in customer habits evolved during a cessation of operations. Moreover, the risk of bitter antagonism (and occasional violence) that makes settlement more difficult is likely to be diminished. Obviously, too, the public is the beneficiary of uninterrupted production or service.

But the scheme has great drawbacks as well. Foremost amongst these is the difficulty of stipulating (whether for purposes of legislation or as the basis of a labour-management agreement) a formula that imposes equivalent losses on the parties. 91/ Policing of this agreement during the semi-strike presents equal difficulty. But even more serious are the criticisms that seem to indicate that a semi-strike simply would not work. 92/ The infliction of monetary losses on the parties does not take account of the psychic roots of conflict nor does it provide the catharsis occasionally needed to re-establish a sound labour-management relationship. Moreover, there are some situations in which one side or the other will be greatly advantaged by the avoidance of sharp conflict or where the issue is one of principle for which one side or the other would willingly incur financial loss.

It is difficult to avoid the conclusion that the statutory strike or semi-strike has only limited possibilities of application, and that it will be confined to those situations where the parties are jointly prepared to experiment with it because of a shared sense of civic responsibility.

2. The Partial Injunction

Another suggestion similar to, but much simpler than, that of the semi-strike is the partial injunction. 93/ This device involves a court order requiring the parties to maintain a minimum level of production or service sufficient to avoid real community disaster but otherwise leaves them free to engage in economic conflict. The partial injunction could be used as a safety factor in any plan of settlement procedures that does not contemplate the total prohibition of strikes and lockouts. To some extent, this is the approach of both the Canadian Public Service Staff Relations Act and of the public interest dispute provisions of the Quebec Labour Code. 94/

3. The National Poll

One of the more bizarre United States legislative proposals 95/ is that "the issue of the continuation or termination of any strike which creates a declared national emergency should, in a national poll, be seasonably put to the people...." 96/ This proposal envisages that the outcome of the poll would determine the future outcome of the strike.

There is virtually nothing to be said in favour of the proposal: it invites the public to pass judgment in simplistic yes-no fashion on issues of great complexity; it virtually assures that an inconvenienced electorate will bring all such strikes to an end without regard to the justness of the positions of the parties; it contributes nothing to the solution of the underlying controversy.

4. All-or-Nothing Arbitration

The great conundrum of compulsory arbitration is how to introduce it without destroying collective bargaining. It has been suggested 97/ that if arbitration could be made "strike-like", i.e., as risky and potentially unattractive as a strike, the parties would settle rather than submit their differences to arbitration just as they now reach agreement rather than confront a strike. One way in which arbitration can be made to act as an incentive to settlement is to force the arbitrator to choose the position of either one side or the other and to deny him power to make any award that is intermediate between the two positions. Rather than have its position rejected because it is too extreme, each party will moderate its demands and the two positions will tend to converge at a mid-point which will become the point of settlement.

The expedient of all-or-nothing arbitration is open to attack on several grounds. First, it assumes that a strike must not take place. However desirable this assumption may be, it is naive to expect that the underlying causes of a strike will evaporate just because a union has had the opportunity to engage in the all-or-nothing bargain-or-be-damned exercise. Second, the proposal fails to take account of the political unacceptability of legislation that might have the effect of virtually destroying one party to an arbitration because the other is (perhaps marginally) more reasonable. Third, there is the tremendous practical difficulty of deciding which of two positions is more reasonable when each consists of a "package" of specific demands that cannot be compared with each other on an individual basis.

But while all-or-nothing arbitration smacks of "gimmickry", and probably could not be made to work in any event, there is no reason why a given union and management should not try it if they are mutually agreed to do so.

E. The Significance of United States Experience

In terms of its relevance to Canada, the United States experience provides a wealth of insights into both useful and ill-conceived legislative efforts to cope with essential industry disputes.

It is clear that the United States labour relations experts are no nearer to discovering a single durable, all-purpose solution, than their Canadian counterparts. Where legislative (or non-legislative) procedures have worked well, the wisdom and good faith of the parties and the administrators involved has been of critical importance. On the other hand, legislation that seemed to be well conceived has in fact proven ineffective where there has not been a real willingness to make it work.

The lesson seems clear enough: Canada must be prepared to experiment in legislation as well as borrow and, above all, to commit human resources of high quality and sufficient quantity to keep the peace in essential industries.

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25/ See Dunlop, op. cit. supra, ref. 13, in which a total of 28 emergency disputes are mentioned.

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63/ See, for example, Wirtz, "The Choice-of-Procedures" Approach to National Emergency Disputes, and Fleming, The Search for a Formula, in Bernstein et al. (eds), op. cit. supra, ref. 32.

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65/ The figures for Nebraska, which has a somewhat different coverage, are as follows (1947-1962): total cases — 15; taxi companies — 5; power districts — 5; urban transit — 3; motor freight carriers — 2.

66/ The New Jersey statute, which covered public utilities, added to the Indiana scheme a power to seize the enterprise. See generally Kennedy, The Handling of Emergency Disputes, (1949) 2 Ann. Proc. I.R.R.A. 14, for an account of the New Jersey experience.

67/ Kennedy, op. cit. supra, ref. 66.

68/ See Northrup & Rowan, op. cit. supra, ref. 64.

69/ Id.

70/ See Kennedy, op. cit. supra, ref. 66; Fleming, op. cit. supra, ref. 63; Roberts, op. cit. supra, ref. 64; Schwartz, Is Compulsory Arbitration Necessary?, 50 Arb. Jo. 189 (1960); but see contra Gregory, Injunctions, Seizure, and Compulsory Arbitration, 26 Temp. L.Q. 397 (1953)

71/ Wirtz, in Bernstein, et al, (eds), op. cit. supra, ref. 32, 149, at p. 162.

72/ See generally, Jones, Compulsion and the Consensual in Labor Arbitration, 51 Va. L. Rev. 369 (1965); Gregory, op. cit. supra, ref. 70; Phelps, Compulsory Arbitration: Some Perspectives, 18 Ind. & Lab. Rel. Rev. 81, (1964); Stevens, Is Compulsory Arbitration Compatible with Bargaining?, 5 Ind. Rel. 38 (1966).

73/ See generally, J.W.F. III, Note, State Seizure of Industries, (1962) 48 Va. L. Rev. 699; Northrup & Rowan, State Seizure in Public Interest Disputes, reproduced in appendix in Northrup, op. cit. supra, ref. 9.

74/ See Cole, op. cit. supra, ref. 61.

75/ Northrup & Rowan, op. cit. supra, ref. 73, at p. 242.

76/ This statute was declared unconstitutional by the United States Supreme Court in Division 1287, Amalgamated Association v. Missouri, (1963) 374 U.S. 74, see supra.

77/ See Gregory, op. cit, supra, ref. 70; but see contra Fleming, op. cit. supra, ref. 63.

78/ See Northrup & Bloom, op. cit. supra, ref. 1, at pp. 455-59.

79/ See Northrup & Bloom, op. cit. supra, ref. 1, at pp. 377-81.

80/ Florida, Kansas, Michigan, Minnesota, Missouri, Utah and Wisconsin.

81/ Intl. Union U.A.W. v. O'Brien, (1950) 339 U.S. 454.

82/ Northrup & Bloom, op. cit. supra, ref. 1, at p. 365.

83/ See generally, Northrup, Fact-Finding in Labor Disputes: The States' Experience, 17 Ind. & Lab. Rel. Rev. (1963), reprinted in Northrup, op. cit. supra, ref. 9, at p. 263 ff.

84/ See Lazar, Lombardi & Seltzer, The Tripartite Commission in Public Interest Labor Disputes in Minnesota, 1940-1960, 14 Lab. L.J. 418 (1963); and Northrup, op. cit. supra, ref. 83, at pp. 274-78.

85/ These industries include, but are not restricted to, those "...engaged in supplying the necessities of life, safety, or health, so that a temporary suspension of its operation would endanger the life, safety, health or well-being of a substantial number of people in the community."

86/ Lazar, et al, op. cit. supra, ref. 84, at p. 433.

87/ Bernstein, State Public Utility Laws and Mediation, 7 Lab. L.J. 496 (1956).

88/ Op. cit. supra, ref. 1, at pp. 420-21.

89/ See, for example, Fleming, The Search For a Formula, in Bernstein et al, (eds), supra, ref. 32, at p. 200 ff; McCalmont, The Semi-Strike, 15 Ind. & Lab. L. Rel. Rev. 191 (1962); Marceau & Musgrave, Strikes in Essential Industries: A Way Out, 27 Harv. Bus. Rev. 27 (1949); Givens, Dealing With National Emergency Disputes, 34 Temp. L.Q. 17 (1960-61).

90/ Op. cit. supra, ref. 89, at p. 195 ff.

91/ McCalmont deals with a number of these problems, op. cit. supra, ref. 89.

92/ See Fleming, op. cit. supra, ref. 89.

93/ See Horlacher, op. cit. supra, ref. 30.

94/ Discussed in Chapter III, supra.

95/ Rothenberg, National Emergency Disputes: A Proposed Solution, 65 Dick. L.R. 1 (1960).

96/ Id., at p. 5.

97/ Stevens, Is Compulsory Arbitration Compatible With Bargaining?, 5 Ind. Rel. 38 (1966); see also Contini, Criticism and Comment, at p. 111, and Stevens, Reply, at p. 114.

CHAPTER V

NON-NORTH-AMERICAN LEGISLATIVE EXPERIENCE WITH ESSENTIAL INDUSTRY DISPUTES 1/

A. United Kingdom 2/

The British system of industrial relations has largely been characterized by the abstention of law. Certainly no attempt has been made to lay down a code governing industrial conflict and occasional judicial utterances and peripheral legislative enactments serve to underline, rather than detract from, this general proposition. However, a random scattering of statutes does affect the legality of strikes in essential industries and services.

Legislation, first enacted in 1875 following a strike of gas workers, punishes by criminal sanctions public utilities workers who "wilfully... break their contract of service". To avoid these sanctions, it is necessary for employees to give notice to terminate their contracts of employment before going on strike, which affords their employer some tactical advantage.

Merchant seamen are, of course, subject to criminal penalties for desertion and for wilful disobedience to lawful commands of their superiors. As well, they do not enjoy the immunities from civil suit that were conferred by the Trade Unions Act, 1906, for torts committed during a trade dispute. It is interesting, however, that during the 1966 seamen's strike no attempt was made to invoke either civil or criminal legislation to forestall the stoppage or to terminate it.

Policemen and postal employees are both explicitly forbidden to strike, upon pain of criminal prosecution. However, "work-to-rule" would seem to remain a legitimate tactic for these groups.

By contrast, there is no general prohibition on strikes by civil servants, although the strikers may be vulnerable to economic and disciplinary sanctions. In the case of nationalized industries, even these legal inhibitions are missing.

In the final analysis, of course, the government does possess residual powers under the Emergency Powers Act, 1920, to meet genuine crises. It can move by regulation (and has done so five times) to take over essential services where there is actual or threatened interference "...with the supply and distribution of food, water, fuel or light or with the means of locomotion to deprive the community...of the essentials of life".

It would be inaccurate to end even a brief review of the British scene without referring to the complex of private and public, but non-binding, tribunals that have been developed to resolve industrial conflict. The well-known Whitley Councils in the civil service, and analogous agencies elsewhere in the public sector, help to keep the peace in many essential industries.

B. Scandinavia

The Scandinavian experience provides an opportunity to assess the problem of strikes in essential services within a framework of successful labour relations that differs in several fundamental aspects from the Canadian or other foreign systems. The solutions that have been used to resolve such disputes in the Scandinavian countries reflect these basic differences, which in turn explain the absence of much of the legal super-structure adopted or

advocated in North America to ensure continuous operations of essential services.

It would be unrealistic to suggest that the four countries involved—Sweden, Denmark, Norway and Finland—have treated these situations in exactly the same manner, or that the various services involved operate within identical systems of labour relations. To this extent, it will be necessary to qualify any general remarks concerning the Scandinavian experience by dealing specifically with incidents in each country. However, it will be useful to consider first a significant feature which all the systems have in common and its contribution to avoiding or resolving strikes in essential services.

Probably the most significant characteristic of Scandinavian labour relations is the emphasis that has consistently been placed on a system of free collective bargaining. Although inroads have been made with the development of state mediation and labour tribunals, a conscious effort prevails to minimize the extent to which the procedures of collective bargaining are regulated by government. The tradition has been to avoid outside interference, leaving the parties to settle their differences alone. But despite this tradition, and despite the existence of highly developed peacekeeping procedures, governments have intervened in each of the Scandinavian countries in moments of actual or threatened crisis.

1. Sweden 3/

This paradox is most strikingly illustrated in Sweden where the 1938 Basic Agreement, negotiated by the Swedish Employers' Confederation and the Confederation of Swedish Trade Unions, makes specific provision in Chapter V for the "Handling of Conflicts Threatening Essential Public Services".

Although it has no binding effect on either of the parties, it allows any "body representing the public interest in question" to bring to the attention of both parties the need to maintain any essential public services during an actual or threatened work stoppage. The dispute is then referred to the Labour Market Council, a central body established under the Basic Agreement and composed of an equal number of delegates representing both parties. The two confederations have undertaken to act on the recommendation of a majority of the Council concerning the "preventing, limiting or settling" of the particular labour conflict. The machinery provided by Chapter V was used on but one occasion, in 1953, in a dispute involving privately-owned electric power stations; the intervention of the Council averted the danger of a conflict imperilling the public interest. Parenthetically, the jurisdiction of the Labour Market Council is defined in broad terms to extend to any "socially dangerous" dispute, whether or not it involves the parties to the 1938 Agreement.

It is difficult to assess to what extent this provision of the Basic Agreement has forestalled strikes or avoided crises in essential industries. Yet clearly the very existence of its provisions evinces a deep concern on the part of both labour and management to protect critical public interests.

However, there have been strikes (or threatened strikes) of nurses, teachers, police and public servants—none of whom are represented by unions affiliated with the Confederation of Swedish Trade Unions. As a result, government has several times intervened in the postwar period in essential industry disputes, either by ad hoc strike-ending legislation or by resort to general legal instruments or doctrines.

In 1947 provisional legislation to force police to perform their duties was introduced in Parliament and in 1951 a bill to impose compulsory settlement on nurses in municipal hospitals was discussed. However, on both occasions the employees threatened to give collective notices of resignation. These threats generated pressure for peaceful settlement and it was not necessary to enact the laws. The same pattern was followed in 1955 when shipowners and officers in the merchant navy seemed incapable of settling their differences. Legislation authorizing a board of arbitrators to impose a settlement was introduced in Parliament but never became law because the parties were able to settle peacefully. On other occasions parties to a dispute have apparently been informed privately by government sources that unless a peaceful settlement was achieved special legislation could be expected.

As to the disputes involving public servants, the situation was, until 1966, more complicated. The former law imposed upon many public officials an "official responsibility" to maintain uninterrupted service in performing the duties of their office and thus to avoid a work stoppage. However, the only means of enforcing these duties was a civil suit by an aggrieved individual rather than government-initiated, administrative or criminal proceedings. Suits were costly, difficult, and infrequent, and were not really useful in dealing with collective action during essential industry disputes.

Unlike the civilly-enforceable "duty to perform", the doctrine that "official responsibility" attaches to certain public officials is rooted in the Penal Code. But like the "duty to perform", its effectiveness is limited because of a failure to provide adequate sanctions and enforcement machinery. The Code had been used successfully to inhibit strikes by assistant postmen, police, railway conductors, bailiffs, and others within its terms. However, lack of uniformity in interpretation meant that in some instances even

firemen were able to bargain collectively, despite their "official responsibility".

In the same manner, the position of civil servants at both the national and municipal levels was not entirely clear in Sweden prior to 1966. In each case the public employer purported to retain, by legislative or executive action, sovereign authority in the field of employment conditions although, in practice, public employees were governed by contracts, very similar to collective agreements.

In 1965 the situation was normalized by the passage of legislation which took effect the following year. Public servants were brought within the general legal framework that operates in the private sector and the Public Officials Act expressly recognized their right to strike ("unless otherwise stipulated in law or agreement"). The 1938 Basic Agreement, which established the Labour Market Council (in so far as it affected government employees) was displaced by a somewhat similar document negotiated by (and covering) various union groups in the public sector. The State Employees Council was established pursuant to this 1966 Basic Agreement, its primary function being to determine whether a particular dispute threatens to disrupt an essential service with "socially dangerous" consequences. Some clue to the scope of this phrase may be gleaned from the fact that it was not even suggested that a month-long teachers' strike/lockout was "socially dangerous". Moreover, the preface of the 1966 Basic Agreement expressly acknowledges that although there is a need for special measures to protect the public interest in "essential utilities, public care, and the like...no approximate demarcation of such fields could be defined claiming objectiveness and general recognition".

Parties are required to avoid (or cease) economic action pending a determination by the Council, but the product of its deliberations is purely declaratory. The Council merely makes a non-binding recommendation to the parties to avoid, limit or settle the dispute. No doubt the prestige of the Council will almost always secure compliance, and in the residue of cases, (if any) ad hoc legislative intervention will be made more politically feasible by the ruling of the Council.

As with labour relations in Sweden generally, the avoidance of essential industry disputes in both the private and public sectors thus depends ultimately on the unusual civic-mindedness of the parties.

2. Denmark 4/

Denmark has invoked legislative sanctions more frequently than the other northern countries to avoid disruption of services and functions essential to the whole community. In 1933 legislation was passed to prevent a threatened general lockout; it prohibited any work stoppages and extended existing collective agreements. Since this precedent was established, the customary method of legislative intervention in Denmark has been to enact into law (on an ad hoc basis) the mediation proposal arrived at under the procedures of the Mediation Act. Excluding the war years, this solution has been resorted to on at least ten occasions, affecting at different times packinghouse workers, typographical workers, dairy workers and agricultural workers. On several occasions such legislation has affected the entire working force when it was used to end a general strike.

Public employment, as well, presents a more clear-cut picture than in Sweden. Government employees are classified as ordinary employees or civil servants. The former operate services such as the state-owned railways and

work in the naval yards. They fall within the terms of the general mediation legislation and have the full right to strike. Civil servants, on the other hand, are much more restricted. Although they are well organized in separate unions, their wages and working conditions are regulated by statute. Bargaining pressure must be exercised through political channels rather than through the usual outlets at the bargaining table. Theoretically, the civil service has no right to participate in collective work stoppages, although the threat of "collective resignations" still remains a practical alternative. However, the great drawback to this course of collective action is that it may result in the loss of civil service status and of the benefits acquired through long service.

3. Finland and Norway 5/

The two smallest Scandinavian countries represent an extreme position in terms of their minimal use of government power to end essential industry disputes.

In Finland, government intervention has been almost unknown, despite two major strikes by civil servants in 1955 and 1963 that paralyzed the railway and postal systems and seriously crippled other vital public services such as customs and prisons. The first of these strikes was followed in 1956 by a 19-day general strike involving 700,000 workers. There was no formal government intervention of a conventional type but the cabinet, in this case, forced acceptance of a government-sponsored settlement proposal by threatening to resign if the plan was rejected. In the political climate of the country, the risk of social instability was apparently so great that this threat produced a settlement. Norway, on the other hand, has used the more conventional types of government intervention, but less frequently than

Sweden or Denmark. For example, in 1964 a threatened general strike that would have involved 135,000 workers in Norway's main industries was thwarted by government-imposed compulsory arbitration.

4. General

In all the Scandinavian countries collective bargaining is conducted on a national scale, between central confederations of employers and of unions, representing whole segments of the economy throughout the nation. This centralization involves a large percentage (or perhaps all) of the labour force in bargaining on any given occasion, and thus may potentially result in a much more extensive disruption of the economy in the event of strike action or lockout. Also, in both Sweden and Denmark there is pressure to reach a common expiration date for collective agreements in the various industrial sectors, which adds to the possibility of a general industrial shutdown.

These institutional arrangements might be thought to transform virtually every major collective bargaining exercise into a potential national crisis, especially when a dispute involves a threatened or actual general strike or lockout. However, the risks inherent in the situation generate their own antidotes. Awareness by the parties of the implications of conflict tend to discourage them from engaging in it. Centralization of negotiations produces sophisticated negotiators and generates a tempering influence on extremists on both sides of the table. But perhaps most important, there is a tradition of industrial self-government that forces the parties to face up to the need to fashion solutions before public pressure for state intervention becomes irresistible.

To be sure, the industrial relations systems of the Scandinavian countries may no longer be as successful as we once thought them to be.

Centralization of negotiations may produce pockets of discontent; the cathartic benefits of the strike are lost. No doubt these systems will continue to adapt and evolve. But the one feature that is likely to survive any process of evolution is the total involvement of the parties of interest in creating procedures and institutions for the settlement of industrial conflict. This alone offers promise for a new and successful industrial relations approach in Scandinavia and should engage our attention as worthy (and possible) of emulation.

C. Western Europe

Unlike Scandinavia, most Western European countries do not have industrial relations systems that can be analogized to our own full-blown collective bargaining process. However, strikes do occur in essential industries almost universally and a brief account of the legislative response to these strikes is warranted.

1. Belgium

While there is no general labour relations legislation either prohibiting strikes or providing a technique for settlement, there has been a long tradition of conciliation through the intervention of "commissions paritaires". These bilateral committees have been established for each trade or industry and are charged with a duty "to take steps to prevent, or to effect conciliation of, all disputes threatening between management and labour".

Although its assistance may be invoked at the request of either party, the commission paritaire has no power to impose a binding settlement, although it may recommend submission to arbitration. In addition, a staff of government conciliators (and, occasionally, cabinet ministers) is available to assist in the settlement of important controversies.

The only significant legislation deals with disputes that affect essential supplies and services. This statute, passed in 1948, authorizes a commission paritaire to requisition both industrial undertakings and employees in order to restore production or service where a vital community interest is affected, at least to the extent necessary to prevent harm to the public. Its determination is given the force of law by Royal Decree. One such Decree, affecting gas and electricity distribution, stipulates that certain services must be maintained in the event of strike or lockout, with the result that negotiations are undertaken in each dispute to identify the consumers who are entitled to uninterrupted service and the amount of electricity required for their purposes. Various classes of government employees are expressly forbidden by statute to strike. Whether a similar prohibition extends to railway employees appears to be a matter of controversy.

A Belgian commentator evaluates the legislation in rather pessimistic tones:

> (T)his experiment begun in 1948 has produced disappointing results. It has shown the danger of entrusting to organizations formed for the protection of their own interests, the protection of the public interest.... (F)or essential needs, which means for the interest of consumers, for the interests of other sections of industry or commerce, and for the interests of the public as a whole, it would seem that such decisions can only properly be taken by the Government after consultation with a bilateral committee representative of different sections of the economy. 6/

2. France

The right to strike in France was proclaimed by the 1946 constitution and, predictably, is not closely regulated. Two particular classes of workers, however, are made subject to special restraints because of their employment in key industries.

Persons employed by "public undertakings of a commercial or industrial character" generally enjoy the full private-sector freedom to strike, although the undertakings so described include public utilities and transportation facilities. However, a 1959 Ordinance, enforceable by criminal sanctions, allows the government to requisition these employees and to compel them to return to work in the event of serious harm to the public. This device is not thought to be particularly effective because of the problems associated with punishing mass defiance of a back-to-work order, a view corroborated by the plant seizures and prolonged stoppages of 1968.

Civil servants, too, are generally permitted to strike, although there is a standing prohibition against a work stoppage by those "...engaged in employment which is essential from the point of view of personnel, equipment, and means of governmental communications". For the most part, however, the scope of this prohibition is left to be decided in the particular case and after the event. Again, in the extraordinary crisis of 1968 the legal rules and institutions appear to have had little effect.

For neither of these groups, nor for industry as a whole, is any effective system of dispute settlement created.

3. Italy

Like France, Italy provided constitutional recognition of the right to strike in 1946. However, no implementing legislation has ever been passed and any legal regulation of industrial conflict has been either judicial or administrative. In broad terms, economic strikes have been considered legitimate, while protest and political strikes have not; however, participation in an unlawful strike merely exposes an employee to dismissal or civil suit rather than prosecution.

The courts have held that strikes in public utilities, otherwise lawful, do not become illegal simply because of a provision in the Penal Code forbidding collective abandonment of such undertakings. This rather peculiar analysis stems from a desire to avoid giving primacy to the fascist-enacted Penal Code over the postwar constitutional right to strike. As for civil servants, no definitive statement of their right to strike has yet been made by the Italian courts.

Given the almost total absence of legislation, then, it seems clear that essential industry disputes are made subject to no special rules. They are, however, amenable to the informal conciliation machinery established by the Ministry of Labour, which frequently and effectively intervenes in important conflict situations.

4. Switzerland

Industrial conflict is almost unknown in Switzerland, although the only legislation of general application deals with settlement through conciliation and arbitration. By and large, as in Scandinavia, industrial peace has been achieved through a scheme of self-made rules, under the aegis of central employer and labour organizations.

Only two pieces of legislation bear on essential industry disputes. There is a blanket prohibition against strikes by public employees and against impeding "the operation of services of public importance". The former is enforced only by the sanction of discipline or dismissal, while the latter is the subject of penal legislation.

D. Australia 7/

The Australian system, of course, provides a mechanism of compulsory arbitration for all interest disputes and for that reason does not establish special procedures for resolution of essential industry disputes. However, perhaps because of its importance, perhaps for political reasons, a special arbitral tribunal has been established for the coal industry.

In addition to dispute settlement procedures, there are a variety of penal statutes designed to meet community crises either on an ongoing or an ad hoc basis. The oldest of these statutes is based upon the 1875 English Conspiracy and Protection of Property Act (which also has its Canadian counterpart in section 365 of the Criminal Code). This legislation makes criminal any breach of a contract of employment with the intention of disrupting the supply of gas or water and has been extended in various states to cover other public utilities, as well as railway and train services, and sewage disposal operations.

More specific anti-strike legislation is found in the Commonwealth Crimes Act, section 30J, which provides for the making of a declaration that a serious industrial dispute prejudices interstate or international trade or commerce in relation to employment in either transportation or government service. Upon such a declaration being made, the strike or lockout becomes illegal. The State of Victoria, like all other states except New South Wales and Queensland, has no general anti-strike law. However, in strikes involving "essential services" (including transport, fuel, light, power, water, sewage and other services designated by order-in-council), a government-supervised strike vote must be held as a condition precedent to the strike.

Finally, in at least two cases, ad hoc legislation has been enacted to deal with essential industry disputes. In 1948, in order to terminate a crippling rail strike, a Queensland statute was passed that virtually outlawed picketing. Federal legislation, in 1949, in effect sequestered the funds of trade unions that supported a nationally disasterous coal strike. In both cases, the statutes helped to bring the strikes to an end and were promptly repealed.

E. The Significance of Foreign Experience

In a recent paper on emergency disputes, Professor John Dunlop stated:

> The term "emergency disputes" has meaning in the context of the industrial relations arrangements of the United States. It has very little meaning, and in any event a different meaning, in other countries. 8/

In a qualifying footnote he adds,

> Despite many differences, perhaps, the Canadian experience is least alien to our own.

Given this caution, it would be well to restrict any examination of the scope of the problem to the two "least alien" systems, those that coexist on the North American continent.

Differences in traditions and philosophies, in the legislative framework, in the structure of labour and management, and in the basic economic institutions, present real pitfalls to any attempt to draw lessons from the experience of other countries, and especially to emulate their dispute settlement procedures. In Professor Dunlop's language:

> (T)here are severe practical limitations to the transplant of statutory measures or institutions from one country to another. Among advanced countries the more diverse the societies and economies, the greater the difficulty with any transposition. 9/

However, two themes do emerge from the successful Scandinavian and Swiss systems and to some extent from the Belgian and British systems. First, it is possible and desirable to place a substantial onus for peacekeeping on the parties themselves, especially by involving them in the creation of institutions (whether private or governmental) through which disputes can be resolved. When these self-made rules are found to be acceptable to the parties, they may acquire an interest in making them work in order to avoid any excuse for governmental intervention. Second, there is a need for highly differentiated solutions to the problems of essential industry disputes. Not all industries will yield to the same formula: in some, it will be possible to endure a total shutdown; in others even a partial disruption of service may prove unacceptable. In the majority of intermediate cases, as the Belgian law suggests, those involved in the dispute can work out appropriate details for maintaining essential services, although some government participation in this process is probably needed in order to ensure the adequacy of protection for the public.

REFERENCES

1/ Material in this section is generally taken from Kahn-Freund (ed.), Labour Relations and the Law - A Comparative Study (1965), except where otherwise indicated. Much information was also derived from a confidential memorandum on Labour Relations and the Question of Disputes in the Public Services of Selected European Countries, prepared for the Task Force by Mr. P. Malles of the Economic Council of Canada (May 1967). The reader is forewarned, however, that the material in this section is a mere sketch of foreign experience, designed to highlight some points of particular interest or relevance (or—in some cases—to indicate the non-interest and non-relevance of a particular country for Canadian purposes).

2/ See also Wedderburn, The Worker and the Law, at 275 ff (1965).

3/ See Schmidt, The Law of Collective Bargaining in Sweden (1962); Johnston, Collective Bargaining in Sweden (1962).

4/ See Galenson, The Danish System of Labour Relations (1952); Arthurs, Labour Lore and Labour Law; A North American View of the Danish Experience, 12 Int. & Comp. L. Q. 247 (1963).

5/ See Rinne, Industrial Relations in Post-War Finland, 89 Ind. & Lab. Rev. 461 (1961).

6/ Lagasse, The Law of Strikes and Lockouts in Belgium in Kahn-Freund (ed.), op. cit. supra, ref. 1, p. 179 at p. 184.

7/ Sykes, Strike Law in Australia (1960).

8/ Dunlop, Procedures for the Settlement of Emergency Disputes, paper presented to the International Conference on Automation, Full Employment, and a Balanced Economy (1967).

9/ Op. cit. supra, ref. 8.

CHAPTER VI

POLICY OBJECTIVES IN ESSENTIAL INDUSTRY LABOUR RELATIONS

After this extended canvass of Canadian and foreign experience with essential industry disputes, it is now necessary to return to the basic questions that gave rise to this study: what are our objectives in essential industry labour disputes and how may those objectives best be realized? This chapter deals with the first of these questions, while the second is the theme of Chapter VII.

At least six different, often irreconcilable, policy objectives can be identified:

(a) freedom of economic action,

(b) industrial peace,

(c) protection of life, health, safety and national security,

(d) protection of the quality of community life,

(e) minimizing economic losses for non-combatants, and

(f) rational allocation of scarce social resources.

What follows is an analysis of the way in which the pursuit of each of these policy objectives is affected by essential industry labour disputes, and the attempts to prevent or resolve such disputes.

A. Freedom of Economic Action

A basic characteristic of economic relationships in our society is that they originate in the free choice of the parties. To be sure, there are some transactions where the state compels one party to deal with the other (e.g.,

public utilities, common carriers) or, where the state stipulates what the terms of the transaction shall be (e.g., insurance contracts). As well, there are situations where the need of one party is matched against the overwhelming economic power of the other, so that what is in theory a freely-made bargain is in actuality imposed by superior strength. But the myth remains: in a free enterprise economy, economic relationships are the product of consensus rather than compulsion.

Nowhere is this myth more deeply engrained than in the labour sector. Despite labour standards legislation (which may determine working conditions) or labour relations and anti-discrimination statutes (which may compel an unwilling employer to hire persons whom he would prefer to reject), despite the weakness of the individual worker vis-à-vis his corporate employer, the terms of employment are generally the product of voluntary agreement. Particularly in the realm of collective bargaining, the reality tends to accord with myth. Equally important, both labour and management do believe that they are, and should continue to be, free agents. Government intervention, however innocuous, is inevitably denounced as an improper diminution of economic liberty, at least by the party whose bargaining position is adversely affected. Indeed, the very designation "collective bargaining" emphasizes consensus as a prime ingredient of the system.

Thus the parties and the community both appear to accept freedom of economic action as a basic policy objective in labour relations generally. To what extent is this objective altered in the essential industry context?

As has been noted, in many essential industries entrepreneurial freedom is modified by laws requiring the provision of adequate and non-discriminatory service at fair rates. Carriers and public utilties provide services

to the community that are apparently so "essential" that they cannot be denied to any individual or to the whole community because the enterprise is insisting on a higher financial return or pursuing some other self-serving goal. Sometimes these services are deemed so essential that private control is displaced altogether by public ownership rather than mere regulation. In these situations, it can plausibly be argued that where freedom of economic action is denied to management it should likewise be denied to labour. If management cannot interrupt service (for example, by a unilateral decision to abandon a railway line), why should a union have the right to bring about the same result by striking? To put the argument the other way around, where a service or industry is so essential as to warrant public regulation or ownership, its employees should be subject to a similar regime of control in the public interest. The conclusion inevitably follows that, by analogy to rate regulation, compulsory arbitration should be used to set wages and strikes should be forbidden.

However, freedom of economic action in labour relations is based as much on expediency as on principle. Sooner or later, every dispute is settled, one way or another, by the collective bargaining process. In the overwhelming majority of cases the parties are able to reach agreement without conflict because they accurately perceive that their interests intersect at a given point, or because they have been bluffed or intimidated into making concessions. In a much smaller percentage of cases, peaceful bargaining breaks down and a work stoppage occurs. The trauma of the work stoppage is generally enough to bring the parties to their senses. Within a period of days, sometimes weeks, they are back at the bargaining table in search of a compromise; the search is almost inevitably successful. In the tiniest fraction of cases, the work stoppage continues until one party or the other in

effect disappears; a company may cease to do business or a union may disband. Judged purely in terms of efficiency in settling disputes, it is difficult to surpass the record of free collective bargaining. 1/

Thus, the argument that favours interference with the parties' freedom of economic action is answered by the pragmatic question: will compulsory arbitration work as efficiently as collective bargaining? Although the institutional problems of compulsory arbitration are discussed at length elsewhere, its defects as compared with collective bargaining can be itemized here:

1. The arbitrator has no meaningful standards to apply and cannot know as much about the needs of the parties and the dynamics of their industry as they themselves do.

2. Wages fixed by an objective standard rather than by labour market pressures may not adequately perform the function of properly allocating resources.

3. Outlawing strikes will not automatically prevent them from happening; the underlying causes of discontent must be eradicated.

4. In those essential industries where rate regulation and public control over managerial decisions does not already exist, compulsory arbitration of wages would create a strong precedent for such regulation.

In summary, arbitration is apt to produce inappropriate decisions, may possibly not avoid conflict, and is likely to engender strong pressures for even more elaborate devices of economic regulation.

If freedom of economic action were an independent policy objective, there would be little reason to distinguish essential industries from others in terms of the way in which collective bargaining is conducted. However, this consideration must be taken as part of a constellation of policy objectives, some of which clearly do differentiate one type of industry from another.

B. Industrial Peace

Industrial conflict is always expensive, both for the parties and for others who are affected by it. It is this consideration which prompts labour and management to compromise their differences, and the community to provide conciliators in order to assist them in the search for compromise. Although many kinds of labour conflicts are now channelled into adjudicative procedures (e.g., representation questions, grievances) the peace may still be broken by controversies over wages and working conditions. In labour relations generally, we have been prepared to give freedom of economic action priority over industrial peace, at least where basic economic interests are at stake.

Almost certainly, in essential industry disputes most people would now reverse the order of priorities and preserve the peace, even if doing so required a sacrifice of the freedom of action of the parties. A. H. Raskin puts this position eloquently in his description of the collective bargaining process:

> Muscle is enshrined as the indispensable element in giving reality to the entire process, despite the enormous range of situations in which the government-certified size of the bargaining unit or the strategic character of the service affected makes the public the primary sufferer whenever unions and employers collide.

> The more ludicrous the whole performance becomes, the more insistently learned scholars explain why it all makes sense and why any community action to protect itself by substituting reason for the unrestrained exercise of force in settling labour disputes represents a stab in the back for Nathan Hale, Paul Revere and all the other apostles of American liberty.
>
> It is past time to arise and proclaim that the emperor has no clothes. It is my conviction that, when all the people have to suffer because of the willfulness or ineptitude of economic power blocks, it is an affirmation—not a denial—of democracy to provide effective government machinery for breaking deadlocks.
>
> The question, in my estimation, is not whether to do it but simply how. I see no reason why in this institution alone, of all the facets of our society, we should exalt the right to make war as the hallmark of industrial civilization when we seek to exorcise it everywhere else, even in the global relations of sovereign powers. 2/

Why has this change in values occurred? As Mr. Raskin suggests, there is a general revulsion against the use of power in many spheres, including international relations and other areas of economic activity. The corollary of this position is the belief that more scientific, or rationalistic, solutions of social problems ought to be within our grasp. As Professor Chamberlain puts it, speaking of a major labour crisis in the steel industry, "our steel technology shames our steel sociology". 3/ Perhaps underlying this growing belief in the need for "civilized" techniques of conflict resolution is a sense of uneasiness produced by recurrent international and domestic crises. Labour strife not only creates its own pressures but it interferes (or is believed to interfere) with our ability to deal with other political, social and economic problems. Here again, the truth of the matter may be less significant than the intensity with which most people hold the conviction.

But all of these comments relate to strikes generally. Obviously, what gives special impact to a desire for labour peace in essential industries is the peculiar nature of the harm done. Since the parties themselves always

suffer loss in the course of a conflict, the peculiar features of an essential industry dispute must be related to its impact on non-parties. In particular, we must examine the dangers to life, health, safety and national security, the impact on the quality of community life, and the economic effect on neutrals of essential industry work stoppages.

C. Protection of Life, Health, Safety, National Security

One definition of an "essential industry" is that it touches the physical security of citizens or the very existence of the state itself. Almost no one denies that physical security and national existence are policy objectives that should be given primacy over almost everything else. However, this is an irreducible minimum above which consensus disappears. There is little agreement as to whether the impact of a strike on the community's convenience and economic stability are considerations that make an ordinary industry into an "essential" one.

However, focusing on the "irreducible minimum", it is clear that most labour disputes do not put life, health, safety or national security at risk. The questions that must be explored are (1) whether, in a given situation, there actually is a risk of any magnitude to these basic community interests, and (2) how great a risk can be tolerated in the interest of achieving other policy objectives?

To answer the second question first, some would say that even the slightest risk to a vital interest should be avoided. For example, a railway strike might leave an isolated community without food, a situation involving obvious health hazards. One school of thought is that all railway strikes should therefore automatically be prohibited. At the other end of the spectrum, it might be argued that the risk is so remote and conjectural that it can be

dismissed in any estimate of whether strikes should be permitted. A middle position (one that I favour) concedes that there may be isolated risks of the type described and proposes that such situations be dealt with apart from the generality of cases. Implicit in this middle position, however, is the proposition that actual risks of the sort mentioned are not permissible.

There is no escape from the difficulty of the first question. The factual determination of whether a labour dispute does or does not create risks is almost impossible. For example, the Saskatchewan doctors' strike of 1963 and the Quebec hospital strike of 1966 prima facie might be thought to have created a grave health hazard. In fact, in Saskatchewan the worst that was put against the striking doctors was the death of a single child who might well have died in any event; in Quebec there were no substantiated charges that the shutdown of hospitals caused or contributed to anyone's death. Several explanations are possible. Either we tend to exaggerate the risks of an interruption of health services, or the harm done is too subtle to be obvious without long-term scientific observation, or the "emergency" service provided in each case is adequate to dispel the anticipated crisis.

In any event, an obvious high-priority policy objective must be the avoidance of actual or potential harm of the type here discussed.

D. Protection of the Quality of Community Life

It is sometimes contended that "essential industries" embrace not only those that affect physical safety and national security but also those that touch other key non-economic interests of the community. Amongst the "industries" so defined are: governmental operations, schools, local and long-distance transportation and communications, newspapers and symbolic attractions (such as Expo). Disruption of any of these by a labour dispute would

not likely endanger anyone but life would certainly be less pleasant and convenient and the community would not be able to accomplish important goals, such as education or the projection of a national "image".

This is probably an area in which emotion, "public opinion", is most important. Although it might be demonstrated that no lasting tangible harm is done, for example, by a strike of school teachers or bus drivers, the public indignation engendered by such strikes is considerable. Accordingly, government comes under strong pressure to intervene to prevent the disruption of service without regard to the merits of the dispute.

A further problem is the open-endedness of the category of industries involved. Even an obviously non-essential commercial establishment (the Royal York Hotel in Toronto and the Levis ferry in Quebec City, to take two recent examples) may become so rooted in the pattern of community life that it acquires a semi-public character. In a small community, a long-established manufacturing firm may be seen as "essential" not only because it employs a sizeable segment of the local work force, but also because it is identified with local habits of life and patterns of power and prestige.

Probably a lower priority should be assigned to the preservation of the quality of community life than is generally done by the public and by those who form and heed its opinions. There are two reasons for this. First, it is relatively easy to manipulate public opinion and to create an uncritical belief that "something must be done" because a work stoppage is "a gun at the head of the community" (to use two editorial clichés). As against this easily-aroused public concern, it is difficult to point to any objective criteria by which it can be shown that the community is surviving an apparent crisis without fundamental disruption. Second, what may be sacrificed in favour of

community convenience is the fairly fundamental freedom of economic action referred to earlier. Apart from any question of principle, there is the practical consideration that too frequent interference with collective bargaining will destroy its efficacy. In the interests of continuing to settle disputes efficiently, we should therefore exercise restraint in responding to this consideration.

Cyrus Ching, former head of the United States Federal Mediation and Conciliation Service, stated these arguments well in 1953. He urged caution in applying the "emergency" label to strikes, an exercise which, he insisted:

> ...requires a singular exercise of personal judgment...tempered by caution lest democratic processes be depreciated or destroyed. Impingement on these processes should never be made on the basis of inconvenience alone.... 4/

For practical reasons, he also urged restraint:

> Ill conceived notions of what constitutes a national emergency should not be employed without deliberate judgment as to the cost to be paid for stability and continuity of production. Labour strife must be viewed in the context of what it does to the country as a whole rather than the irritation and inconvenience it may cause to relatively small groups. There are no shortcuts to industrial peace.... 5/

However, while restraint and caution should undoubtedly be a basic premise of government policy, it must be conceded that political realities militate in favour of prompt and dramatic action when the quality of community life is thought to be in danger.

E. Minimizing Economic Losses for Non-Combatants

A special illustration of the desire to avoid community disruption is the concern to avoid economic loss for those affected by a labour dispute, although not parties to it. This policy prevails in all labour disputes and is evidenced by legal restraints on sympathetic or secondary strikes and

boycotts. Indeed, one rationale of a government conciliation service is that a strike will inevitably cause losses to others besides the particular union and employer involved, so that the expenditure of public funds to settle a potential conflict is justified by the ultimate saving to the community.

What distinguishes the essential industry dispute is the fact that so many "neutrals" are likely to be injured. A trucking strike is bound to have a pervasive effect on the movement of goods, preventing supplies from reaching manufacturers and finished products from reaching markets. When the flow of natural products is interrupted, there is a risk of spoilage and permanent loss to thousands of producers, as well as to those employed in processing and retailing. If electric power is interrupted, almost all economic activity would be brought to a halt.

Yet all of these losses are measurable in dollar terms. They are different in degree, but not in kind, from the losses suffered by suppliers and customers in the ordinary labour dispute. It can persuasively be argued, then, that widespread economic repercussions are not, per se, a reason for suspending normal rules governing industrial disputes. It is (on this thesis) the nature of the harm done rather than its intensity which justifies differential treatment for "essential" industries. To put the argument the other way around, if any strike that potentially causes large economic losses throughout the economy is to be treated as a crisis warranting special measures, there would be no logical reason for permitting a strike in any major industry.

If economic effects could be isolated from all other consequences, this position would be almost unanswerable. However, social and political consequences often flow from the interruption of certain industries which seem,

at first blush, to involve purely dollars-and-cents issues. Consider, for example, a strike in the building industry. High labour costs contribute to (but are not solely responsible for) high housing costs; delays occasioned by the strike cause dislocation for homeowners, apartment tenants, schools and other public institutions; to this extent the "quality of community life" obviously suffers; an aroused public may exert pressure on government. Similarly, a railroad strike may impede wheat deliveries abroad and endanger future prospects for sales. The commercial negotiations for wheat sales may provide one avenue of international contact, loss of which would not be in the nation's interest. In other words, it is difficult to disregard the economic consequences of strikes in key areas because these cannot be divorced from non-economic considerations.

F. Rational Allocation of Social Resources

In private sector labour negotiations, a wage increase won by the union may be offset by several employer responses. Frequently, the employer's higher labour costs will be recouped by an increase in the price charged to the consumer. Occasionally, profits may be diluted (at least temporarily) to absorb the increased labour cost. In most cases, over the long run, increased productivity and increased sales will be expected to provide the additional revenue. No doubt, the relative elasticity of corporate budgetary and managerial responses make adjustment to new employment conditions reasonably easy. Not so in many essential industries.

Such industries often operate on fixed budgets. This is true, obviously, of governments and government-subsidized activities. As well, industries that are subject to rate regulation are likewise unable to simply pass the cost of wage increases along to the public in the form of higher rates.

The problem is not simply the time-consuming formality which must accompany an application for approval of a rate increase or the process of imposing (and then collecting) new taxes. Rather, the broad social (and political) consequences of such a move are what creates special problems. Consider, for example, the decelerating effect on the economy of an increase in income tax, the burden imposed on low income groups by an increase in health or hospital insurance premiums, the indignation aroused by an even higher level of property and education tax at the municipal level, and the implications for western farmers of a change in freight rates. These are profound considerations in wage negotiations in such essential industries as public employment, hospitals and other health services, schools and municipal services, and railroads.

Apart from broad social goals, a wage increase also may dramatically affect the functioning of the essential industry itself. Take, for example, the possible results of increasing the salaries of policemen. If this increase comes in the middle of a budget year, the money for the wage increase will have to be found within the budget by cutting back other expenditures. Such "frills" as in-service education, public relations, or new uniforms might be sacrificed. It might be decided to abandon or restrict recruitment of new policemen. Such measures would undoubtedly affect morale and efficiency. Even if the increase coincides with the adoption of a new budget, the necessary public funds can likely be found for the police only by diverting them, for instance, from the fire department.

While the inability of public agencies and regulated industries to adjust to higher labour costs may be exaggerated in this analysis, it is true that what happens at the bargaining table resounds throughout the industry. At least in marginal terms, the allocation of scarce social resources and the

determination of policy priorities may take place in response to the pressure of economic power by employees rather than in response to a deliberate and rational judgment of social need.

It remains to be stated that this result can be avoided only with difficulty. If employees in essential industries are not paid on a basis comparable to that of other persons doing similar work, they are being called upon to subsidize the public service involved by accepting less for their services than the labour market would warrant. Not only is it difficult to support this position, it is also arguable that those who surrender (or are denied) the right to strike to gain their objectives should be rewarded for the loss of this basic "right". The reward might take the form of above-average working conditions.

In the final analysis, then, the dilemma is inescapable. If working conditions in an essential industry are to be determined by reference to general social criteria ("how much do we want to spend for education?") real injustices may result for employees. On the other hand, if the bargaining power of employees is permitted to determine budget priorities, social policies may be seriously distorted.

One further point is worthy of consideration. If the managers of an essential industry are confronted with the need to offer a substantial wage increase to employees, they may have to seek a rate or tax increase. Because any such increase is likely to be a politically sensitive issue, they will have to satisfy the regulatory body (or the electorate) that they have done everything possible to avoid it. To create this impression, negotiations will have to be taken to the brink of crisis, even when the inevitable result can be predicted. There is a risk that no preliminary management offers

will be taken seriously or that bargaining may become a labour-management charade, enacted for the benefit of the public. In the long run, the distorting effect of the public's direct financial interest is likely to adversely affect the quality of bargaining.

With all of these reservations, it must still be said that an important policy objective is to avoid a situation in which social priorities are determined by collective bargaining pressures, while also avoiding inequitable treatment of employees performing critical public tasks in essential industries.

Keeping these general policy objectives in mind, and conceding that they are sometimes contradictory, we must next examine the specific issues presented by the need to formulate concrete legislative proposals for dispute setttlement in essential industries.

REFERENCES

1/ Moreover, Professor Dunlop has also pointed out that collective bargaining has made at least three other, more subtle, contributions to the organization of the economy. First, it forces each side of the bargaining table to determine its priorities before coming to negotiations by a process of internal trade-offs. Second, by providing a technique of grievance handling, efficiency is enhanced. Third, through a variety of industry-wide schemes, in areas such as trade training and welfare plans, general social functions are assumed by labour and management. See Dunlop, The Social Utility of Collective Bargaining, in Ullman (ed.), Challenges to Collective Bargaining, 168 at p. 172 ff. (1967).

2/ Raskin, Collective Bargaining and the Public Interest, in Ullman, op. cit. supra, ref. 1, 155 at p. 156.

3/ Chamberlain, The Problem of Strikes, (1960) 13 N. Y. U. Ann. Conf. on Lab. 421 at p. 424.

4/ Ching, Collective Bargaining and the Emergency Dispute, 26 Temp. L. Q. 363 at p. 364 (1953).

5/ Id. at p. 366.

CHAPTER VII

DEVISING TECHNIQUES FOR SETTLING ESSENTIAL INDUSTRY DISPUTES

In the light of the divergent policy objectives discussed in the preceding chapter, it is now possible to identify certain functional and disfunctional features of existing or proposed solutions for the essential industry dispute problem. In so doing, it should also be possible to devise a method of settling such disputes which serves the maximum number of those policy objectives. This exercise will be attempted in the concluding chapter of this study.

First, however, a number of technical questions must be explored, which are posed in the form of alternatives:

(a) Uniform or pluralistic solutions? Is it desirable, and is it feasible, to establish a uniform method of dispute settlement for all essential industries? Or should special settlement procedures be created for each industry?

(b) Pre-fabricated or ad hoc solutions? Should settlement procedures (whether a single procedure or a range of possible procedures) be prescribed by law and available for successive disputes as they arise, or should solutions be created ad hoc in response to the exigencies of each particular dispute as it presents itself?

(c) Compulsion or voluntarism? Should procedures adopted for the resolution of essential industry disputes compel the parties to accept binding third-party settlement of their differences, without stoppage of work? Or should the state go no further than to

maximize pressures and inducements for settlement, leaving open the possibility of conflict in the event the parties are unable to resolve their differences through collective bargaining?

(d) Peacekeeping or dispute settlement? Should our major emphasis be to safeguard the community against the disruption caused by strikes and lockouts, or should we rather emphasize resolution of the underlying causes of conflict?

(e) Predictability or flexibility? Should settlement procedures (whether pre-fabricated or ad hoc) culminate in a single predictable "last step"? Or should the maximum uncertainty be preserved by permitting the parties or the state to elect from amongst a broad range of possible settlement procedures those which seem expedient in the particular case, or at the particular stage of the dispute?

To be sure, in electing between these competing values, the choice will often be "more or less" rather than "either-or". But by juxtaposing polar positions, the advantages and disadvantages of each can be assessed, and a conscious decision made as to what is gained or lost by a compromise between them.

A. Uniform or Pluralistic Solutions?

There are certain advantages to uniformity. Foremost amongst these is the appearance of fairness. Where different rules are established for disputes in different industries, disgruntled parties can always cry "discrimination". To explain why "rights" are enjoyed by one group of workers and not another, or why one industry is protected against disruption while another

is not, may involve specious or invidious distinctions. For example, over the past 15 years, a de facto prohibition against railway strikes has emerged in Canada. Why should municipal transit workers, long-distance bus and truck drivers, seamen and airline employees be treated differently? It is possible to find some basis for distinction that has a ring of rationality 1/, but in the final analysis the political realities are what appear to tilt the scales in favour of more active intervention in some industries than in others. In other words, the complaint of unequal treatment is often justified. To the extent that equality and fairness are important social values, they point in the direction of uniformity rather than differential treatment.

A second factor favouring uniformity is administrative efficiency. Instead of having to create and staff a number of administrative tribunals, and to work out different substantive and procedural rules for each, one body of men and one body of law can do the job. When there is only one set of rules to be observed, administrators and the professional advisers of industries and unions quickly develop sophistication and expertise. This, in turn, contributes to the smooth functioning of settlement procedures. By way of caveat, however, this notion of efficiency rests on a model of dispute settlement that is highly "judicialized", so that the precedent of earlier disputes tends to determine the method of dealing with subsequent disputes.

Thus, both of these arguments in favour of uniformity ultimately rest on values external to the industrial relations system—equality of treatment and administrative efficiency. They do not reflect the effectiveness of the procedure in securing settlements in any given industry or the differential impact of uniform procedures on the relative power of labour and management in different industries.

A third argument in favour of uniformity does relate more specifically to the efficacy of special industry arrangements as a technique of industrial peacekeeping. As one study of the Railway Labor Act concluded:

> (T)he Railway Labor Act is, in effect, special-privilege legislation. It confers rights and duties dissimilar to those conferred on the parties in other industries.... Perhaps the very existence of special-privilege legislation has so conditioned the parties in the railroad industry to governmentally imposed solutions that they cannot be expected to face up to their problems. 2/

However, this argument really is directed to the particular form of "special-privilege" or differentiated legislation: the Railway Labor Act is characterized by a high degree of state intervention rather than self-government by the parties. As has been suggested, "compulsion or voluntarism?" is really a different issue altogether. The real risk is, rather, that when one industry is removed from the general regime of collective bargaining and made subject to special rules designed to promote settlement, no matter how innocuous, the special treatment will be seen as a precedent justifying further, more authoritative, state regulation. One party may be tempted to press for legislation that imposes some form of final dispute settlement device on the other, because it despairs of winning its objectives through normal bargaining procedures. The risk, in other words, is not psycological but tactical. Once the door is opened to special treatment, the form of special treatment is likely to be manipulated to serve the short-run objectives of the parties, or even the political fortunes of the government.

These fears are, however, largely based upon conjecture. In terms of actual Canadian experience, the Alberta, Saskatchewan and British Columbia statutes which cover a substantial number of essential industries have not been invoked (except in the Saskatchewan Power strike of 1966) so there is

really no evidence one way or the other to test the case for uniformity. To the extent that the analogy is a relevant one, the predominant weight of professional opinion is that a uniform policy of compelling conciliation in all industries and for all disputes is undesirable. 3/

In the United States, the uniform procedures laid down by the Taft-Hartley Act for settling national emergency disputes never were intended to be applied to railways and airlines and were displaced by informal non-statutory procedures in atomic energy and missile installations, and certain defence industries. As well, some "essential industries", such as charitable hospitals, were not covered by Taft-Hartley. To the extent that the uniform procedures have been applied in a variety of industries, the results do not seem to warrant our following the United States example. Indeed, in a number of cases there was resort to informal, ad hoc extral-legal procedures in preference to those provided by the statute, presumably because it was recognized that the uniform statutory procedures would not yield the desired results. In terms of the point made above about the precedent impact of special legislation, the United States experience, like the Canadian, is inconclusive. It will, however, be canvassed in the next section which examines the choice between "pre-fabricated or ad hoc solutions".

First, however, the case for special legislation for each essential industry must be considered. Any attempt to evaluate dispute settlement techniques must necessarily begin with an accurate assessment of the causes of conflict. In any given situation, one or more causes may be identified: a desire for higher wages caused by inflation or the temptations of a consumption-oriented society; a desire for job security in the face of technological or product market changes; institutional rivalries between unions or between groups within a union; resentment at managerial insensitivity or the

dehumanizing processes of industrial work; simple devotion to the cult of "more" or nostalgic remembrances of past power. Beyond all of these identifiable factors, perhaps, is the sheer inevitability of disputes:

> The prospect is thus one of continuing conflict. This certainly need not mean violent conflict. An essential of democratic social systems is the acceptance of conflict relationships, controlled as far as feasible to insure compromise and accommodation. The alternative is some form of dictatorship.... 4/

It follows from this analysis that so long as our industrial relations system continues to be premised upon the consent and participation of those who live within it, controversies will continue to occur and will never be finally resolved. Moreover, the techniques of securing compromise and accommodation must be responsive to the causes of conflict present in each particular situation. These will vary from industry to industry and from one set of negotiations to the next. Finally, the degree of tolerance for what has been referred to above as "some form of dictatorship" also varies from time to time, partly in response to domestic or international crises, partly in response to changing perceptions of how much governmental power is consistent with freedom.

It is pointless, then, to evaluate "fact-finding" or "compulsory arbitration" or any other device, in isolation from the particular industries in which it is proposed that they should operate, or without reference to the particular kinds of controversies they are designed to resolve. For example, compulsory arbitration might "work" as a technique of setting wages in a situation where one group of workers is trying to match the gains secured by another. However, if their wage demands are a reaction against a feeling of insecurity engendered by the prospect of change or against management arbitrariness in the handling of grievances, the adversary processes of arbitration

are unlikely to bring to the surface the root causes of the controversy. Thus, an award of money may leave unresolved the underlying differences between the parties, which may continue to smoulder and ultimately to burst forth in a work stoppage. To take another example, a fact-finding inquiry might produce the information that the failure of the parties to agree to a settlement is caused by the political insecurity of union officers. Announcement of this fact can only diminish the prospects of settlement, whereas a procedure in which the officers were relieved of the obligation of agreement, in which settlement was imposed by a third party, might in fact be perfectly acceptable to all concerned.

A number of eminent observers have come out strongly in favour of pluralistic solutions, appropriately fashioned to meet the problems of each industry. Most far-reaching in advocating this approach is Professor John Dunlop, who urges that special arrangements be undertaken "for those sectors or industries which have shown repeated serious difficulties in dispute settlement", without regard to whether they are essential or not. 5/ Indeed, he suggests that "a tentative list...might include newspapers, maritime, railroads, construction and airlines". 6/ In the designated industries under the Dunlop plan:

> (L)abor and management representatives should meet regularly over a period, such as a year or two, to seek procedures through which to improve the performance of collective bargaining.... The parties should be required to report jointly to Congress at the end of the period on the results of their conference including mutually agreeable recommendations they intend to make and any legislative proposals.... 7/

In preparing their recommendations, the parties would have available the assistance of public and private experts. In addition to being responsive to the particular problems of the industry, this approach also engages the

attention of the parties in advance of a crisis, and in the context of a regime of industrial self-government.

A somewhat similar scheme has been advocated by Professor Archibald Cox 8/ and a host of other writers 9/ who have advocated that maximum opportunity be afforded labour and management to devise their own appropriate approach to "responsible", non-disruptive techniques of dispute settlement.

On balance, the case for pluralism is more persuasive than the case for uniformity. At very least, the experiences of different industries living under different regimes (good or bad) will provide us with useful comparative insights. If we do ultimately move toward uniformity, we will be able to do it more easily if we first observe the relative strengths and weaknesses of a number of different systems.

B. Pre-fabricated or ad hoc Solutions?

Another, closely related, choice to be made is whether the rules governing dispute settlement should be created in advance of a dispute or only in response to its particular dynamic. Obviously, to the extent that ad hoc rules are employed, a pluralistic pattern will emerge; thus preference for the ad hoc necessarily implies preference for pluralism. The converse, however, is not necessarily true; it is possible to have pre-fabricated or standing legislation that applies only to a single industry.

An imposing array of arguments, both principled and practical, favours the pre-fabricated solution.

To repeat a cliché, used earlier in this study, it is considered unfair to "change the rules in the middle of the game". If parties engaged in collective bargaining have acted or refrained from acting on the basis that they

would then move through a series of pre-determined steps to a confrontation, one or the other may be prejudiced by ad hoc alteration of the rules. For example, a union may have dragged its heels in negotiations so that it could threaten an employer with a strike in the midst of his peak business period. It may therefore have rejected moderate offers made early in negotiations in the expectation that a strike threat would bring better results at the right moment. In the midst of negotiations, ad hoc legislation is passed outlawing the strike. The former offer is withdrawn and the union is left with only the prospect of making meagre gains at arbitration instead of substantial gains through the use of economic power. The union would appear to have considerable cause for complaining that it has been unfairly robbed of a tactical advantage and also prejudiced by being induced to believe it could safely forego its "bird in the hand", the employer's early offer.

Moreover, by ad hoc intervention which drastically alters the power balance, the government is liable to be accused of favouritism, of forsaking its traditional role of referee in the labour-management contest. However unfounded the accusation in the particular case, if it is made several times, one or other of the parties may develop an attitude of suspicion and resentment which will impair on a long-term basis the government's ability to act as a neutral.

A third consideration favouring pre-fabricated solutions is the difficulty of making cool judgments in the midst of crisis. Ad hoc legislation may accomplish too little or too much because there was not time to think through its implications at either the policy or the technical level. In the same vein, those charged with executing the ad hoc solution may lack the knowledge and experience to do so properly, at least as compared with persons who have performed a similar task may times. For example, an arbitrator

appointed by ad hoc legislation to set wages in the railway industry would likely not have the wealth of statistical data, the knowledge of special railway work practices, the sense of ongoing problems, possessed by a permanent arbitral tribunal, established and hearing cases over a period of years and supported by a knowledgeable staff. The ad hoc arbitrator would have to spend some time on his own basic "education" and still perhaps not develop the expertise that can only come with experience.

A fourth significant point is the sheer inertia of the legislative process. Assuming that a strike occurs while the legislature is in session, it is possible that the enactment of legislation would be a reasonably lengthy process. A determination must be made as to the appropriate mode of state intervention in the dispute: next, the appropriate statutory language must be found; the proposed act must jostle for place on the Order Paper amidst the press of other urgent public business; finally the possible delays of prolonged debate on the floor of the legislature must be taken into account. Of course, if the legislature is not sitting at the time, the difficulties of convening it (both formal and physical) are considerable.

Finally, the dispute itself may be more difficult to resolve if the need for special legislation becomes a matter of partisan political controversy. A union or an employer seeking or opposing such legislation can do much to inflame public opinion and to attract the support of either the government or the opposition. Legislation enacted in this atmosphere will undoubtedly be viewed by one side or the other with suspicion and resentment. Such attitudes may well produce intransigence at negotiations or deliberate disobedience of back-to-work orders.

For all of these reasons, then, pre-fabricated procedures are to be preferred to those created ad hoc. However, a persuasive case can be made on the other side. 10/

At the root of the opposition to pre-fabricated settlement procedures is a belief in the desirability of having the parties resolve their differences without the intervention of the state. From this basic position, it follows that any procedure that maximizes the pressure for negotiation and compromise is to be preferred over one that maximizes third-party decision making. For a number of reasons, ad hoc procedures are said to interfere least with direct labour-management negotiations.

Obviously, the ad hoc approach maximizes uncertainty. The parties do not know whether any legislation will be forthcoming or what form it might take. Consequently, they are unable to rely upon third-party intervention in the event of an impasse and must therefore be more diligent in seeking settlement. Secondly, the ad hoc solution can be tailored to the precise problem at hand: if an obstreperous union membership will repudiate a negotiated settlement, a statute may have to actually stipulate what wages and working conditions shall be; if there is some prospect of further collective bargaining, a statute might simply postpone a strike; if wage increases are limited by a rigid rate structure (e.g., in railways) legislation might adjust both rates and wages simultaneously; if work practices or working conditions require drastic alteration, legislation may provide a technique of investigation, planning, and financial assistance for those displaced. As one author puts it (perhaps overstating the case):

> There are no answers to problems of national (labor) emergencies or catastrophies that can be given in terms of anticipatory legislation. 11/

Thirdly, ad hoc solutions do not necessarily cast their shadow over future controversies, although repeated resort to the legislature in every crisis in a particular industry may establish precedents that in fact make succeeding events entirely predictable.

Perhaps the strongest argument in favour of the ad hoc approach is that it may in fact not have to be resorted to. The uncertain prospects of state intervention may often be sufficiently distasteful that labour and management prefer to work out their own solutions. The ad hoc approach, then, is a deterrent to irresponsibility.

On balance, it is difficult to avoid the conclusion that so long as voluntarism remains a prime value in our industrial relations policy, ad hoc solutions are to be preferred over pre-fabricated ones. The importance to be attached to voluntarism will be canvassed next.

C. Compulsion or Voluntarism?

A basic assumption of our collective bargaining system is that the negotiating parties are free to agree or to disagree. In the event of disagreement, a work stoppage will result, the purpose of which is to generate pressures for agreement. Although almost all strikes and lockouts do ultimately produce a contract, for a period of days, weeks or months, production is disrupted. In any ordinary situation this disruption entails costs for the parties and for a number of noncombatants, yet society is prepared to countenance strikes and lockouts. In essential industries, there is considerable opinion in favour of establishing final and binding dispute settlement procedures, because the costs to the community of industrial conflict are thought to be excessive. To test the validity of this position, we must

identify those advantages of voluntarism that would be lost by requiring final settlement without stoppage of work in essential industries.

The first consideration is that the parties know better than any outsider what will best serve their mutual interests. This point holds true for both economic and non-economic issues: whether a company can "afford" an increase and whether the workers can "accept" a raise are basically subjective decisions; whether particular work rules or seniority arrangements are workable depends on the particular conditions of the plant or industry, knowledge of which an outsider is unlikely to possess. As a practical matter, then, the sheer difficulty of satisfactory third-party decision making is a strong argument in favour of voluntarism.

The whole free enterprise system rests on the efficiency of private decision making in response to market pressures. To produce third-party decisions as rationally and as spontaneously may not be impossible (as the experience of some "socialist" regimes suggests) but it does clearly involve a heavy commitment in human resources to the job of gathering the relevant facts and evaluating them to produce a desired result. More importantly, it assumes that there is a desired result, a standard against which wages and working conditions can be measured. In a "socialist" regime the desired result is to produce a given quantity of goods for consumption in response to an overall plan. There is no counterpart to this criterion in our economy which (outside the labour sector) remains largely unregulated in terms of social goals. Thus, if we do turn to a system involving final and binding settlement of interest disputes, all we can do is to approximate the results that private consensus would have produced. We can probably come close, although the process will be somewhat inefficient. However, it may be difficult to persuade the parties that they are no worse off as a result of being deprived of their right to disagree.

Next comes a question of principle: can freedom of economic activity be analogized to the freedom of social and political activity that is central to a democratic society? In point of fact, we have not accepted this analogy. Many restraints on economic freedom have been imposed in order to preserve other significant values. For example, all aspects of the business of public utilities and common carriers are closely regulated in order to ensure that the community enjoys uninterrupted service at reasonable rates. Again, employers are inhibited in the use of economic pressure to thwart unionization so that the freedom of association of workers can be preserved. It is difficult, in the light of these examples, to accept the premise that interference with the right to wage economic warfare is an undemocratic violation of fundamental rights.

On the other hand, there is no denying that to most unionists the right to strike is seen as absolutely vital and even to many employers the idea of compulsory arbitration is repugnant in the extreme. 12/ Surrender of these cherished beliefs, no matter how irrational they may be, is unlikely to be easily accomplished. Moreover, willing departure from a regime of voluntarism in essential industry disputes is made even more difficult by contrast with its continued existence in the rest of the economy. In short, if labour and management favour voluntarism, it will be hard to impose binding procedures on them.

Connected with this point is the difficulty of enforcing the law against a large group of people especially when they are required to perform some positive act such as working or carrying on business. Unless obedience to the law's command is freely given, or government is committed to a brutal and expensive campaign of enforcement, the rules will soon become a dead letter. Within the present framework of labour relations in Canada, it can

safely be predicted that in many situations finality will be difficult to "sell" to the parties. We may therefore have to confront the unpleasant task of enforcement.

To summarize, the major arguments in favour of voluntarism are:

(a) its relative efficiency—most disputes are now settled privately to the reasonable satisfaction of both sides, at little expense to the state;

(b) the practical difficulties of enforcing final and binding settlement procedures when labour and management are not committed to accepting them.

Neither of these are so compelling that they warrant rejection of any compulsion exercised on the parties under all circumstances. At best, they suggest that the present voluntary regime be left to function unless there is something substantial to be gained by displacing it. The position is well stated by Professor John Dunlop:

> A ringing declaration of the virtues of free collective bargaining, or of the evils of compulsory arbitration, or of the sacredness of the right to strike or to lock out, or that any government intervention as an opening wedge will lead inevitably to full government controls or socialism is not likely to provide a basis for serious discourse. 13/

However, Professor Dunlop (and most other observers) would clearly subscribe to the premise that "our bias should properly remain with the consensual". 14/

It is important here to reiterate a point developed earlier: industries, and even particular crises, each have special characteristics which invite highly individualized legislative responses. Where on a sliding scale of voluntarism a particular solution lies cannot be accurately determined without reference to the specific facts of the case.

D. Peacekeeping or Dispute Settlement?

Depending on how authoritarian we are prepared to be, it is possible to preserve industrial peace by simply outlawing strikes and by rigorously enforcing the prohibition. Without settling the underlying controversy, or without settling it on "fair" terms, we can still safeguard the public interest in continued production or service in an essential industry—at least for a time. Sooner or later, however, there is a risk that festering grievances will erupt in strikes, no matter how tainted with illegality they may be. Apart from strikes, there is considerable likelihood that disgruntled workers will engage in slowdowns, inefficient work practices, and even acts of sabotage. Therefore, apart from any question of fairness, it is important that disputes be settled and not merely suppressed.

This admonition may be unnecessary because no current proposals favour the one-track solution of a strike ban. However, by posing the question in this way the need to take effective measures to settle disruptive controversies is emphasized. On the premise that a dispute is genuinely "settled" only when the parties have reached a consensus, it is evident that much attention must be devoted to the agreement-producing or agreement-inhibiting potential of any proposed scheme.

As will be seen, compulsory arbitration is said to inhibit the chance of voluntary agreement because concessions made en route to adjudication may do nothing to produce a more favourable decision for the compromise-minded party. In a scheme in which arbitration is a pre-determined ultimate step, then, there may be a tendency for disputes to be passed forward for third-party decision. In such a scheme (and as well in other kinds of schemes) inducements to settlement must be maximized. 15/ Clearly, conventional conciliation

procedures must be pursued by persons of experience and competence. There should be experimentation with joint committees, non-crisis bargaining, and other institutional arrangements designed to ease tensions. Government can do much by providing needed information and above all by using its regulatory authority in many essential industries to provide the funds to make fair settlements economically feasible.

All of these suggestions flow from the practical consideration that the peace is most effectively preserved when the root causes of conflict are eradicated. However, the pre-eminent importance of dispute settlement is a matter of fairness as well. If the community demands an uncommon degree of civic responsibility from those engaged in essential industries, the community ought to be prepared to reward them for it. If we ask people not to use their economic power, not to exact high wages by threatening to shut down a key industry, we ought to promise them that they will not suffer as a result. 16/

E. Predictability or Flexibility?

The choice between predictability and flexibility must inevitably be resolved in favour of the latter so long as a preliminary judgment has been made in favour of collective bargaining. The point has been made eloquently by W. Willard Wirtz:

> If the function of government were simply to stop strikes when the public interest becomes sufficiently affected, there would appear neither need nor justification for consideration of a variety of procedures. The labor injunction does that job, usually with a great dispatch. If, at the other extreme, government's function here were to fix the terms upon which arguments would be settled, then some form of compulsory arbitration would be the only thing worth talking about. The "choice of procedures" theory develops from the reasoning that the function of government in this area is neither just to stop a fight nor to settle an argument, but is rather to implement and possibly even force the settlement of serious disputes by the collective bargaining process. 17/

That flexibility is required seems beyond dispute; certainly it is a proposition endorsed by a distinguished company of experts. 18/ But this is not to say that it is impossible to provide legislatively what Professor Neil Chamberlain calls a "bag of tricks" 19/ that could be used in appropriate cases:

> (A)ny satisfactory strike-control program must allow a large measure of administrative flexibility, simply because strikes cannot be classified in advance by degree of public effects, because even within the same industry or firm the nature of effects varies with underlying conditions. It seems no less clear, however, that we should work to provide adequate guides for the exercise of administrative discretion.... 20/

The difficulty comes, of course, in reconciling the need for uncertainty as a spur to settlement with the need for advance warning if we are to establish effective institutions through which administrative "flexibility" can be expressed. To refer to an example already raised in another context, if arbitration is one of the available range of remedies, can it effectively be undertaken if there are not available personnel and data and pre-established rules of procedure designed to produce the fairest and most knowledgeable adjudication?

Of course, it is possible—making a virtue of necessity—to deliberately impose on the parties the risks of a jerry-built arbitral tribunal, on the ground that they will thereby be induced to settle their differences rather than endure its potentially disasterous judgment. While this position is difficult to advocate, so long as we believe in the feasibility of making purposeful governmental decisions, the alternative is hardly more palatable. If all of the possibilities are well defined and their forms and limits well known, the parties will be preoccupied with jockeying for position rather than with collective bargaining.

To opt, ultimately, for flexibility, however, is not to deny the possibility that in a given industry the parties may find for themselves a satisfying and effective procedure that they repeatedly and regularly use in aid of (or as a substitute for) collective bargaining. Where this can be done, it clearly should be done.

F. Summary

So long as collective bargaining remains central to our general labour policy, it seems clear that voluntarism should likewise remain a primary value in essential industry disputes. A clear and compelling case would have to be made out for any proposal that would detract from, or displace, the effectiveness of negotiation. From this basic premise, it follows that dispute settlement (rather than mere avoidance of strikes) must be the objective. Flexibility undoubtedly aids in this task.

In pursuit of flexibility, pluralistic solutions are probably necessary. Although no solution is more "flexible" than one created ad hoc, a wide range of pre-fabricated solutions may well yield adequate flexibility, provided they can be invoked quickly enough.

In the light of these policy choices, the next (and final) chapter of this study is an attempt to develop an experimental model of a statute that might effectively deal with essential industry disputes.

By way of preface to the last chapter, it should be noted that the model statute described is one that would permit the use of almost any device (or series of devices) that has been advocated for the settlement of essential industry disputes. For this reason, there has been no attempt to make an evaluation of the efficacy of each particular device: compulsory arbitration

or mediation, special ad hoc legislation, statutory strikes, and so forth. There is another (and equally important) reason for not doing so. An intelligent evaluation of these devices can only be made in context, in relation to the nature of the industry, the traditions and beliefs of the parties, the stage to which their relationship has matured, and the issues presented by the dispute in question. Almost all experiments with essential industry disputes legislation contain at least the seeds of a workable solution, provided they are conducted in the right time, place, and circumstance.

REFERENCES

1/ For an attempt at objective analysis, see Kartnell, Labour Disputes and Settlement on the Canadian Railways, unpublished M. A. Thesis, McGill U. (1965). Kartnell answers affirmatively the question: "Does A Canadian Railway Strike Create an Emergency?" However, in my view, the case is simply not proven. Virtually all of the "facts" upon which he relies are taken from the self-serving pronouncements of the protagonists, or the conclusions of politicians and commentators, unsubstantiated by empirical data. Moreover, he ignores the implications of his own "hard facts", e.g., the railways' share of total inter-city ton miles of freight carried fell from about 60% to 40% between 1950 and 1962; no doubt the decline of railway passenger traffic is even more pronounced.

2/ Northrup & Bloom, Government and Labor, at pp. 344-5.

3/ See supra, Chapter III, ref. 5.

4/ Kornhauser, Human Motivations Underlying Industrial Conflict, in Kornhauser, Dubin & Ross (eds.), Industrial Conflict, at p. 85 (1954); cf. Dubin, Constructive Aspects of Industrial Conflict, op. cit. supra, at p. 40.

5/ Dunlop, The Social Utility of Collective Bargaining, in Ullman (ed.), Challenges to Collective Bargaining, at 168 ff. (1967). See similar proposals by Professor Dunlop in The Settlement of Emergency Disputes, 5 Proc. Ann. Meeting I.R.R.A. 117 and Procedures for the Settlement of Emergency Disputes, unpublished address (1967).

6/ The Social Utility of Collective Bargaining, op. cit. supra, ref. 5, at p. 178.

7/ Ibid.

8/ Cox, Law and the National Labor Policy, at p. 53 ff. (1960).

9/ See, e.g., Aaron, Observations on the United States Experience, 14 Lab. Law Jo. 746 at p. 750 (1963); Fleming, Emergency Strikes and National Policy, 11 Lab. Law Jo. 267 (1960); Horlacher, A Political Science View of National Emergency Disputes, 333 The Annals 85 (1961); Kramer, Emergency Strikes, 11 Lab. Law Jo. 227 at p. 234 (1960).

10/ See Dunlop, The Settlement of Emergency Disputes, op. cit. supra, ref. 5; Givens, Dealing with National Emergency Labor Disputes, 34 Temp. L. Q. 17 (1960-61).

11/ Katz, National Emergency Strikes, (1954) 7 N. Y. U. Ann. Conf. on Labor 361 at p. 379.

12/ See, e.g., Cooper, The National Interest in Collective Bargaining, 13 Lab. Law Jo. 922 at p. 923 (1962).

> [Compulsory arbitration] is alien to our shores. It bespeaks the corporate state. Freedom-loving people want none of it. After all, if our struggle with the dictatorships is to be worth the candle, our problem is, and must be, how to have an efficiently operating free enterprise system - not how to depart from it in the direction of government control.

(Mr. Cooper was the Executive Vice-president, Personnel Service, United States Steel Corporation).

13/ Dunlop, Procedures for the Settlement of Emergency Disputes, op. cit. supra, ref. 5, at p. 8.

14/ Jones, Compulsion and the Consensual in Labor Arbitration, 51 Va. L. R. 369 at p. 394 (1965).

15/ See Warren, Mediation and Fact Finding, in Kornhauser et al (eds.), op. cit. supra, ref. 1, at p. 300: "...Labor disputes which have a vital effect on the public welfare require that special pressure techniques be available for their settlement. The range of pressures which may be exerted in such major disputes must be broader than those used in normal mediation."

16/ See Slichter, The Challenge of Industrial Relations, at p. 169 (1947).

17/ Wirtz, The "Choice of Procedures" Approach to National Emergency Disputes, in Bernstein, Enarson & Fleming (eds.), Emergency Disputes and National Policy, at p. 150 (1955).

18/ See, e.g., Independent Study Group, Committee for Economic Development, The Public Interest in National Labor Policy, (1961).

19/ Chamberlain, The Problem of Strikes, (1960) 13 N. Y. U. Ann. Conf. on Lab. 421 at p. 427.

20/ Chamberlain & Schilling, The Impact of Strikes: Their Social and Economic Costs, at p. 253 (1954).

CHAPTER VIII

CONCLUSION AND PROPOSAL: THE INDUSTRIAL PEACE ACT

There will be little dissent from the proposition, already stated several times, that peace is one of the primary values to be served in essential industry labour relations. Labour, management, and public representatives might well differ as to whether, in any given situation, peace is so important as to justify the sacrifice of other values, but in general terms what the public wants is peace *per se*, while the parties want peace with honour. Thus, the concept of industrial peace is at least a rallying point to which the conflicting forces of private and public interest can be summoned.

For reasons that have been canvassed, however, industrial peace is most likely to be achieved by emphasizing dispute settlement through procedures that incorporate the qualities of voluntarism and flexibility, which are pluralistic and (at least arguably) *ad hoc*. There is, then, no single solution that is so "right" that it can be successfully imposed by laws of general application. On the other hand, the occasional need to sacrifice other values in order to secure peace requires that peacekeeping procedures cannot be based simply upon the consensus of the parties or the good sense of the government; some means must be found of establishing procedures that have the force of law. Yet laws are usually universal in their application, while the exigencies of labour relations demand individualized treatment.

In order to escape from this apparent paradox, what is needed is a means of giving legal effect to a series of particular (and essentially private) peacekeeping schemes, without imposing the dead hand of uniformity and permanence upon them. The solution proposed below is that each industry that

might be deemed "essential" should be encouraged to meet and review the procedures now employed to solve its industrial relations problems, to formulate new and more effective procedures, and to submit these new procedures for approval to an expert public body. Upon approval, the procedures would be given the force of law, in the sense that all concerned would be obliged to comply, and in the sense that boards or experts required to implement the new procedures could be publicly appointed and remunerated.

Several points must be made at the outset, by way of disclaimer. First, this idea is not entirely original. It owes much to the "industry conference" proposals of Professor John Dunlop mentioned earlier and to the Scandinavian technique of blending public and private lawmaking. There is also ample Canadian precedent, both historical and contemporary, for laws that cover a single industry and, on occasion, such laws have been framed (at least partly) by informal discussions between the government and the parties. Second, what follows does not purport to be anything more than an experimental model, advanced for the purposes of demonstrating in visible form that certain theoretical concepts are capable of being translated into functioning institutions. Hopefully, then, no particular weight will be attached to such details as specific time limits or nomenclature. Third, no attempt has been made to cast this proposal in language that would meet the standards of a parliamentary draftsman or to make the many interstitial judgments which the process of drafting always uncovers. Finally, although the proposed statute is framed to fall within federal jurisdiction, there is no intrinsic obstacle to its adaptation for provincial purposes.

INDUSTRIAL PEACE ACT

(Proposed)

1. There shall be established a Canada Commission for Peace in Industry (CCPI), comprising ten members appointed by the Governor in Council, four of whom shall represent the public, three of whom shall represent organized labour, and three of whom shall represent management.

The tripartite composition of the proposed CCPI reflects the essentially legislative nature of its work. In a broad sense, the CCPI must enjoy both a public mandate and a mandate from the parties if it is to be effective. However, it is hoped that the members of the CCPI will be distinguished citizens who view themselves as industrial statesmen discharging a public function, rather than as the advocates or mere messengers of an interest group. There should be some reasonable security of tenure (say five years) to ensure continuity and to diminish the intensity of partisanship.

2. "Designated industries" include those concerned with

   (a) interprovincial or international transportation and communications, longshoring, and the production of goods or services essential to the safety or security of Canada, and

   (b) any other industry designated by the CCPI.

3. An Industrial Peace Plan shall be prepared for each designated industry in order to promote the peaceful settlement of industrial disputes with due regard to the public interest.

The purpose of these sections is to produce pluralistic solutions, each appropriate to a particular industry. The industries that have been designated by statute are those that are generally regarded as sensitive or dispute-prone. However, the power of the CCPI to "designate" other industries might ultimately bring virtually all employment within federal legislative jurisdiction within the ambit of the Act. This is not as controversial as might

first appear, because (as will be seen) the preparation of an Industrial Peace Plan may involve no inhibition whatsoever on the present freedom of action of the parties. The statute might also provide some technique for revoking a designation (whether by statute or by the CCPI), for exempting certain portions of an industry from a general designation, and for determining controversial questions arising out of the definition, such as what is "essential to the safety or security of Canada".

A tenable argument might be made for the proposition that the legislation should not attempt to designate any industry specifically, and that the task of designation should be left entirely to the CCPI. Such an arrangement would enhance the flexibility of the scheme, although it might be viewed as an abandonment by Parliament of its responsibilities. This consideration apart, either alternative is consistent with the general approach of the proposed statute.

4. Within 30 days after the coming into force of this Act, or of any designation made under this Act, the CCPI shall convene a conference of each designated industry or the several parts thereof, for the purpose of preparing an Industrial Peace Plan.

5. All major employers and all major labour organizations in the industry shall be represented at the conference.

These provisions are central to the Act: the basic responsibility for creating the Peace Plan rests with the interest groups who are most intimately affected. In this way, it is hoped, the most workable Plan will be evolved and the moral commitment of the parties to adhere to the Plan will be secured. Conversely, the Plan will not be created by someone who is oblivious to the customs and realities of the industry, nor will it be imposed on the parties as the result of public indignation in time of crisis.

Some provision must be made in the Act for securing representation at the industry conference from all of the major interest groups and, perhaps, for allocating proportionate weight in its deliberations to each.

6. After seeking the views of employers and labour organizations, the CCPI shall appoint a chairman for each industry conference.

7. At the request of the chairman, the CCPI may provide him with professional, technical or clerical staff, and with such other assistance as may be necessary for the full and fruitful exploration of the issues confronting the conference.

8. The chairman of the conference shall from time to time make a confidential report on its deliberations to the CCPI.

The purpose of these sections is to establish the presence of the CCPI at the conference. This is important for two reasons. First, the Peace Plan must ultimately survive the scrutiny of the CCPI and the test of "the public interest" (discussed below). Through the chairman, the conference and the CCPI can in effect conduct ongoing informal "negotiations" to ensure that when the Plan is ultimately submitted for approval of the CCPI, it will pass muster. Second, the CCPI will act as the employer of a corps of economists, lawyers, and other experts, and as a clearing house for data. Both personnel and information would be made available to the conference, through its chairman, in order to assist the participants in making informed and technically sound decisions. The importance of adequate data for both identifying and solving problems cannot be overstated.

It is anticipated that, unless a preference is expressed by labour and management for some particular individual, the conference chairman designated by the CCPI would normally be one of its four public members. In this way, a close nexus would be preserved between the CCPI and the conference and there would be some guarantee that the person playing the key role of

chairman would be competent to do so. However, the primary objective is to bring the conference to a successful conclusion. If all of the public members are personae non gratae, or if someone else enjoys the mutual confidence of the parties of interest, the choice of chairman should be made from outside the ranks of CCPI public members.

Needless to say, if a CCPI public member did act as chairman, he would be disqualified from later sitting in judgment on the Plan as a member of the CCPI.

9. Within six months after its first meeting, each industry conference shall adopt an Industrial Peace Plan that is acceptable to a majority of labour organizations and of employers represented at the conference.

10. If an industry conference fails to adopt an Industrial Peace Plan within six months, or if it should be dissolved sooner, the CCPI shall prepare an Industrial Peace Plan for the industry, after such discussions with representatives of labour and management as it deems appropriate.

These provisions are the "cutting edge" of the legislation. The parties are permitted to work out their own destiny; they are given every assistance in this effort. But if they are unable or unwilling to accept this opportunity and responsibility, they must pay the price of having the job done for them by the state.

Naturally, if the CCPI is called upon to work out a Plan, it will want to do so in a manner that is likely to produce a workable arrangement. Thus it will wish to consult with the parties. However, if by their intransigence they have forfeited the right to self-government, the parties are in no position to claim a veto power over the CCPI.

11. (1) Without restricting the freedom of the parties or the CCPI to devise and establish techniques for promoting industrial peace, an Industrial Peace Plan may provide

for any of the following procedures, either individually or in combination:

(a) final and binding arbitration,
(b) non-binding arbitration,
(c) mediation and conciliation,
(d) postponement of strikes and lockouts,
(e) preservation of minimum or emergency services,
(f) special bargaining or consultative procedures,
(g) recourse to the procedures contemplated by general industrial relations legislation, including strike or lockout, or
(h) any other procedure that helps to promote industrial peace.

(2) No procedure shall be incorporated in an Industrial Peace Plan which, in the opinion of the CCPI, is not in the public interest.

12. Every Industrial Peace Plan shall become effective upon approval by the CCPI, and shall thereupon become binding upon all employers, employees and labour organizations in the industry.

13. (1) If, in the opinion of the CCPI, an Industrial Peace Plan is in the public interest, it shall approve the Plan.

(2) If, in the opinion of the CCPI, an Industrial Peace Plan is not in the public interest, it shall amend the Plan in order to ensure that it is in the public interest, and shall then approve it.

14. In determining whether an Industrial Peace Plan is in the public interest, the CCPI shall have regard to,

(a) the promotion of labour-management negotiation and agreement over wages and working conditions,
(b) the avoidance of industrial conflict that endangers the security and safety of the Canadian community or the health or life of its citizens,
(c) the reduction of industrial conflict that disrupts the social, political and economic life of the Canadian community, and
(d) the observance, so far as possible, of efficiency and simplicity in administration of the Plan.

These sections allow the parties full freedom to experiment and innovate, subject only to the overriding objective of protecting the public interest. They may adopt a well-tested procedure or devise a new one. They may adopt a Plan that establishes a choice of procedures. Hopefully, Indus-dustrial Peace Plans will also reach beyond the actual arena of conflict and

lay the foundations for lasting institutions that will contribute to healthy, ongoing labour-management relationships. It may become obvious during the course of an industry conference, for example, that inter-union rivalry or the spectre of technological displacement is a major cause of conflict. The Plan may set in motion machinery that will produce a union bargaining coalition or establish a joint committee charged with producing a formula for employment security. To the extent that the causes of conflict are to be eradicated by public (as well as private) action, the CCPI can be a catalyst to such action. Most important, the industry conference itself provides an occasion for examination of the basic features of the particular bargaining system, while the need to produce a Peace Plan provides an incentive for trading-off distasteful concessions for otherwise unobtainable benefits. For example, the employers in an industry may seek a common expiry date for all collective agreements, while the unions may be intent upon avoiding any intrusion upon their right to strike. Ordinary collective bargaining would not likely resolve such issues, but an industry "summit" conference would be the logical way to identify the quid pro quo and to create a legal basis for the exchange.

Even if the parties do not rise to this challenge, but choose instead to confine their efforts to the rules of industrial conflict, the proposed statute offers at least several advantages over any present method of establishing those rules. First, the parties are obliged to seek a compromise formula rather than to adopt adamant positions of, typically, compulsory arbitration as against complete freedom to strike. They know that neither position is likely to be accepted by the CCPI unless it is supported by sound logic. Second, the search for a formula is not complicated by the existence of an actual bargaining impasse and its attendant pressures. In the calmer

atmosphere of a conference, greater progress is likely to be made. Third, the residual power to create settlement procedures (if the industry conference fails) rests not with Parliament, which is likely to act on the basis of political calculations, but with a sophisticated and prestigious commission. Fourth, whether devised by the parties or the CCPI, the terms of any Peace Plan are more likely to be appropriate than those provided by all-purpose or standing legislation. The CCPI, for example, would have available to it the confidential reports of the conference chairman which would be most useful in creating or approving a Plan. Fifth, although the proposed criterion of "public interest" is not defined with great specificity, the listing of certain factors that are to be considered by the CCPI represents at least the beginning of informed judgment. In any given case, the degree of voluntarism or compulsion, or the way in which compulsion is used, can be evaluated in terms of certain stated policy objectives.

To avoid any misunderstanding, it should be clearly stated that the CCPI would be empowered to impose compulsory arbitration in an appropriate case. It could, on the other hand, decide to place no new restrictions at all on the right to strike, trusting instead that improved bargaining procedures will adequately serve the public interest.

Finally, it should be added that the Act envisages that normal labour relations legislation will not be displaced by the Industrial Peace Act, except to the extent necessary to give effect to a Peace Plan.

15. When an Industrial Peace Plan has been approved by the CCPI, it shall remain in force
(a) for a period of three years, or
(b) until a new plan is approved,
whichever is the sooner.

16. (1) Not more than nine, or less than six, months before the expiry date of an Industrial Peace Plan, any union or employer bound by it may serve notice upon the CCPI requesting that a conference be convened to consider changes in the Plan, or to consider its termination.
(2) The CCPI may reject the notice or call the conference.
(3) A conference called under this section shall have the same effect as a conference called under section 4.

Briefly stated, the purpose of these sections is to disengage discussion of procedures for settlement from bargaining over substantive issues. By having the Plan remain in force for a fixed period, and by providing for regular (but limited) opportunities for revision, there is less chance that a new or revised Plan will have to be created in the midst of a crisis.

While the onus of proof will no doubt fall on the party seeking revision of a Plan, at least the issue can be raised at periodic intervals. On the other hand, even if the Plan is working well, the suggested formula would require that a new Plan be adopted every three years, even if identical to the old. This should minimize the likelihood of obsolescence.

17. Where the provisions of an Industrial Peace Plan require the doing of any thing that is forbidden by the provisions of the Industrial Relations and Disputes Investigation Act, the order of the CCPI approving such Plan shall constitute a valid defence to a charge of having violated the said statute.

18. Where the provisions of an Industrial Peace Plan require the establishment of a tribunal or other body having power to make final and binding orders, the CCPI may establish such tribunal or body subject to the approval of the Governor in Council, or may itself exercise the functions of such tribunal or body.

19. Where the provisions of an Industrial Peace Plan require the enactment of legislation or the expenditure of public funds, other than the costs of administration of this Act, the CCPI shall forthwith bring the necessity for such legislation or expenditure to the attention of Parliament.

20. The costs of administration of this Act, or of any tribunal established pursuant to this Act, shall be paid by the Consolidated Revenue Fund.

The purpose of these sections is to attempt to conform to principles of parliamentary government. Inevitably, Peace Plans will require the establishment of new bodies that must possess power to make legally binding decisions. These bodies may include arbitration tribunals, or mediation commissions having power to "mediate to finality". It is necessary, therefore, to convey legal power to them without offending a prejudice against executive-made "criminal law". So far as possible, however, it is hoped that the parties will select the CCPI itself to function as the tribunal established by their Plan in order to avoid creating and staffing a large number of new bodies.

When a Plan envisages the introduction of new financial arrangements, it is clearly necessary to secure parliamentary participation. This would be equally true whether, for example, a Peace Plan envisaged an increase in freight rates to make possible a pay raise, or the establishment of an industry relocation and retraining fund by means of payroll deductions and a government subsidy. By and large, Peace Plans will be superimposed upon established collective bargaining legislation. However, it may be that some Plans will be thought to violate provisions of existing law. For example, a Plan may strip strikers of their statutory employment status as a means of compelling resort to arbitration, or divest an employer of his statutorily protected right to close his business "for cause".

This area of the statute is, clearly, its Achilles' heel because of the need to ensure parliamentary concurrence in schemes devised by private parties and approved, in the public interest, by the CCPI. While no doubt Parliament will generally co-operate, there may still be obstacles: the press of other business, the lack of funds, occasional political partisanship.

But since the only alternative is to avoid these parliamentary problems altogether by concentrating on more innocuous, non-structural reform, the CCPI will simply have to try to establish the prestige that will make its requests for legislation undeniable.

It will be apparent from this experimental model of an Industrial Peace Act that what is proposed is not a solution to essential industry disputes but rather a formula with which a solution can be sought in each industry, with some realistic prospect of success. But beyond the formula, beyond the solution, are people. No matter how sophisticated legislation is, it will not secure the peace if those who are affected by the legislation are determined to sabotage it. Conversely, men of good will and high professional competence are not really inhibited by the absence of legislation. If they are determined to do so, they can build an effective relationship without regard to the statutory regime.

To be blunt, then, the author of this proposal can claim no credit should the experiment succeed, nor can he accept responsibility should it fail. The only intrinsic merit in the proposal (if it has any) is that it does involve labour, management and government in a concerted search for a mutually acceptable Peace Plan. This experience, alone, may do much to lay the groundwork for subsequent consensus on substantive issues thrown up during collective bargaining.

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APPENDIX A

LEGISLATION USED TO PROHIBIT OR POSTPONE WORK STOPPAGES

(By Industry)

1950 - 1967

SERVICE	LEGISLATION
ELECTRICITY	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54. B.C. Hydro & Power Authority Act, S.B.C. 1964, c.7, s.56. Labour Relations Act, R.S.M. 1954, c.132, s.78, as amended, S.M. 1958, c.29. Toronto Hydro-Employees Union Dispute Act (1965), S.O. 1965, c.131, s.6 [ad hoc]. Ontario Hydro-Employees Union Dispute Act (1961-62), S.O. 1961-62, c.94, s.5, [ad hoc]. Essential Services Emergency Act, S.S. 1966, c.2, s.7. Trade Union Act, R.S.N.S. 1954, c.295, s.68(2), as amended, S.N.S. 1965, c.53, [postponement of right to strike]. Industrial Relations Act, S.P.E.I. 1962, c.18, s.42, [postponement of right to strike]. Trade Union Act, S.P.E.I. 1953, c.3, [repealed]. Labour Code, R.S.Q. 1964, c.50, s.99, [postponement of right to strike].
FIREMEN	Fire Departments Platoon Act, R.S.A. 1955, c.114, s.14. Municipal Act, R.S.B.C. 1960, c.255, s.194. Fire Departments Arbitration Act, R.S.M. 1954, c.8, s.8, [if union constitution prohibits strike]. Industrial Relations Act, S.P.E.I. 1962, c.18, s.44. Fire Departments Act, R.S.O. 1960, c.145, s.6. Labour Code, R.S.Q. 1964, c.141, s.93. Fire Departments Platoon Act, R.S.S. 1965, c.173, s.10, [if union constitution prohibits strike].
GAS	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54. Essential Services Emergency Act, S.S. 1966, c.2, s.7. Labour Code, R.S.Q. 1964, c.50, s.99, [postponement of right to strike].
HEAT	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54. Essential Services Emergency Act, S.S. 1966, c.2, s.7.
HOSPITAL EMPLOYEES	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54. Labour Relations Act, R.S.N. 1952, c.258, s.39A, as amended, S.N. 1963, c.82, [repealed]. Hospital Employees (Employment) Act 1966-67, S.N. 1967, c.11, s.5. Hospital Labour Disputes Arbitration Act, S.O. 1965, c.48, s.8. Industrial Relations Act, S.P.E.I. 1962, c.18, s.44, as amended, S.P.E.I. 1966, c.19. Essential Services Emergency Act, S.S. 1966, c.2, s.7. Labour Code, R.S.Q. 1964, c.50, s.99, [right to strike postponed].

SERVICE	LEGISLATION
POLICE	The Police Act, R.S.A. 1955, c.236, ss.24-30, as amended, S.A. 1956, c.41. Municipal Act, R.S.B.C. 1960, c.255, s.194. Labour Relations Act, R.S.M. 1954, c.132, s.21(2). The Police Act, R.S.O. 1960, c.298, ss.26-35. Industrial Relations Act, S.P.E.I. 1962, c.18, s.44. Labour Code, R.S.Q. 1964, c.141, ss.93,142. City Act, R.S.S. 1965, c.147, s.104, [if union constitution prohibits strike].
PUBLIC EMPLOYEES	Public Service Act, R.S.A. 1955, C.263, ss.59-60, as amended, S.A. 1965, c.75. Public Service Staff Relations Act, S.C. 1967, c.72, [designated employees; employees choosing compulsory arbitration]. Civil Service Act, R.S.M. 1954, c.39, s.451, as amended, S.M. 1965, c.11. Civil Service Act, R.S.N.B. 1952, c.29, s.52, as amended, S.N.B. 1964, c.17. Public Service Act, R.S.O. 1960, c.331, s.19, as amended, S.O. 1962-63, c.118, S.O. 1966, c.130. Public Service Employees Disputes Act, S.Q. 1944, c.31, s.5, [repealed]. Civil Service Act, S.Q. 1965, c.14, s.75, [essential services]. Labour Code, R.S.Q. 1964, c.141, s.99, as amended, S.Q. 1965, c.50, [postponement of right to strike].
RAILWAYS	Maintenance of Railway Operation Act, 1950, S.C. 1950-51, c.1, [ad hoc]. Railway Operation Continuation Act, S.C. 1960-61, c.2, s.4. Maintenance of Railway Operation Act, 1966, S.C. 1966, Bill C-230.
TEACHERS	Public Schools Act, R.S.B.C. 1960, c.319, s.140, as amended, S.B.C. 1965, c.41. Public Schools Act, R.S.M. 1954, c.215, s.384, as amended, S.M. 1956, c.53. Public Service Employees Disputes Act, S.Q. 1944, c.31, s.5, [repealed]. An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, S.Q. 1967, Bill 25, [ad hoc]. Labour Code, R.S.Q. 1964, c.50, s.99, [right to strike postponed].
TELEPHONE	Labour Relations Act, R.S.M. 1954, c.132, s.78, as amended, S.M. 1958, c.29. Industrial Relations Act, S.P.E.I. 1962, c.18, s.42, [postponement of right to strike]. Trade Union Act, S.P.E.I. 1953, c.3, [repealed]. Labour Code, R.S.Q. 1964, c.50, s.99, [postponement of right to strike].
TRANSPORTATION	British Columbia Coast Steamship Service Act, S.C. 1958, c.7, s.4, [ad hoc]. Transportation Board Act, R.S.Q. 1964, c.228, as amended, S.Q. 1965, Bill 1. Civil Defence Act, R.S.B.C. 1960, c.55 [ad hoc]. P.E.I. Emergency Measures Act, S.P.E.I. 1959, c.4, as amended, S.P.E.I. 1966, c.3, [ad hoc]. Labour Code, R.S.Q. 1964, c.50, s.99, [right to strike postponed].
WATER	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54. Essential Services Emergency Act, S.S. 1966, c.2, s.7. Labour Code, R.S.Q. 1964, c.50, s.99, [postponement of right to strike].

SERVICE	LEGISLATION
MISCELLANEOUS:	
Garbagemen	Labour Code, R.S.Q. 1964, c.50, s.99 [right to strike postponed]
Grain Handlers	Emergency Powers Act, R.S.C. 1952, c.96 [extended by order-in-council].
Liquor Commission	Trade Union Act, R.S.N.S. 1954, c.295, s.68(2), as amended, S.N.S. 1965, c.53, [postponement of right to strike]. Labour Relations Act, R.S.M. 1954, c.132, s.78, as amended, S.M. 1958, c.29.
Loggers	Trade Union (Emergency Provisions) Act, S.N. 1959, c.2 [ad hoc]. (Labour Relations Act, R.S.N. 1952, c.258, as amended, S.N. 1959, c.1, S.N. 1960, c.58, S.N. 1963, c.82) [repealed].

APPENDIX B

SPECIAL LEGISLATION AFFECTING DISPUTES IN ESSENTIAL SERVICES

(By Method of Settlement)

1950 - 1967

METHOD	LEGISLATION	APPLICATION
COMPULSORY ARBITRATION	Fire Departments Platoon Act, R.S.A. 1955, c.114, s.14.	Firemen
	The Police Act, R.S.A. 1955, c.236, ss.24-30, as amended, S.A. 1956, c.41.	Police
	Public Schools Act, R.S.B.C. 1960, c.319, s.140, as amended, S.B.C. 1965, c.41.	Teachers
	Maintenance of Railway Operation Act, 1950, S.C. 1950-51, c.1.	Railways
	Maintenance of Railway Operation Act, 1966, S.C. 1966, Bill C-230.	Railways
	British Columbia Coast Steamship Service Act, S.C. 1958, c.7, s.7.	B.C. ferry service
	Fire Departments Arbitration Act, R.S.M. 1954, c.8, s.6, [if union constitution prohibits strike].	Firemen
	Public Schools Act, R.S.M. 1954, c.215, s.379, as amended, S.M. 1956, c.53.	Teachers
	The Police Act, R.S.O. 1960, c.298, ss.26-35.	Police
	Fire Departments Act, R.S.O. 1960, c.145, s.7.	Firemen
	Hospital Labour Disputes Arbitration Act, S.O. 1965, c.48, ss.5-7.	Hospital employees
	Public Service Act, R.S.O. 1960, c.331, s.19(b).	Public employees
	Toronto Hydro-Employees Union Dispute Act (1965), S.O. 1965, c.131, ss.3,4.	Hydro employees
	Ontario Hydro-Employees Union Dispute Act (1961-62), S.O. 1961-62, c.94, ss.2,3.	Hydro employees
	Industrial Relations Act, S.P.E.I. 1962, c.18, s.44, as amended, S.P.E.I. 1966, c.19.	Police, firemen, hospital employees
	Public Service Staff Relations Act, S.C. 1967, c.72, s.72.	Public employees (except those choosing conciliation procedures)
	Public Service Employees Disputes Act, S.Q. 1944, c.31, s.4, [repealed].	Teachers, public employees
	Labour Code, R.S.Q. 1964, c.141, s.82.	Police, firemen
	An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, S.Q. 1967, Bill 25, s.28.	Teachers
	Essential Services Emergency Act, S.S. 1966, c.2, s.4.	Heat, water, electricity gas, hospitals
	City Act, R.S.S. 1965, c.147, s.104, [if union constitution prohibits strike].	Police
	Fire Departments Platoon Act, R.S.S. 1965, c.173, s.10.	Firemen
	Labour Relations Act, R.S.N. 1952, c.258, s.6A, as amended, S.N. 1963, c.82, [repealed].	Hospital employees
BINDING CONCILIATION	Municipal Act, R.S.B.C. 1960, c.255, s.194.	Police, firemen
	B.C. Hydro & Power Authority Act, S.B.C. 1964, c.7, s.56.	Hydro employees
BINDING MEDIATION	Public Service Act, R.S.A. 1955, c.263, ss.59,60, as amended, S.A. 1965, c.75, [if no mediation board, Government makes final settlement].	Public employees

METHOD	LEGISLATION	APPLICATION
BINDING REPORT OF ROYAL COMMISSION	St. Lawrence Ports Working Conditions Act, S.C. 1966-67, Bill C-215, ss.3,4.	Longshoremen
LT.-GOV. CONFIRMS OR VARIES MEDIATION AWARD	Civil Service Act, R.S.M. 1954, c.39, s.451, as amended, S.M. 1965, c.11.	Public employees
	Labour Relations Act, R.S.M. 1954, c.132, s.78, as amended, S.M. 1958, c.29.	Electricity, telephone, liquor commission employees
P.U.C. CONFIRMS OR VARIES CONCILIATION REPORT	Trade Union Act, S.P.E.I. 1953, (2d sess.), c.3, s.23, [repealed].	Public utility employees
SEIZURE	British Columbia Coast Steamship Service Act, S.C. 1958, c.7, ss.3,4.	B.C. ferry service
	Transportation Board Act, R.S.Q. 1964, c.228, as amended, S.Q. 1965, Bill 1, s.36a.	Public water service
	Hospitals Act, R.S.Q. 1964, c.164, s.17.	Hospitals
REVOCATION OF UNION'S CERTIFICATION	Trade Union (Emergency Provisions) Act, S.N. 1959, c.2. (Labour Relations Act, R.S.N. 1952, c.258, as amended, S.N. 1959, c.1, S.N. 1960, c.58, S.N. 1963, c.82) [repealed].	Loggers
APPOINTMENT OF TRUSTEE	Maritime Transportation Unions Trustees Act, S.C. 1963, c.17.	Seamen
USE OF SPECIAL EMERGENCY POWERS	Emergency Powers Act, R.S.C. 1952, c.96.	Grain handlers
	Civil Defence Act, R.S.B.C. 1960, c.55.	B.C. ferry service
	P.E.I. Emergency Measures Act, S.P.E.I. 1959, c.4, as amended, S.P.E.I. 1966, c.3.	Ferry service
CHOICE OF PROCEDURES	Alberta Labour Act, R.S.A. 1955, c.167, s.99, as amended, S.A. 1960, c.54.	Heat, water, electricity, gas, hospital
POSTPONEMENT OF RIGHT TO STRIKE	Trade Union Act, R.S.N.S. 1954, c.295, s.68(2), as amended, S.N.S. 1965, c.53.	Power, liquor commission employees
	Industrial Relations Act, S.P.E.I. 1962, c.18, s.42.	Hydro employees, telephone employees
	Labour Code, R.S.Q. 1964, c.141, s.99, as amended, S.Q. 1965, c.50.	Public employees (except essential services)
	Conciliation & Labour Act, R.S.C. 1927, c.110.	Railways
	Railway Operation Continuation Act, S.C. 1960-61, c.2.	Railways
	An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, S.Q. 1967, Bill 25.	Teachers

METHOD	LEGISLATION	APPLICATION
NON-BINDING CONCILIATION, MEDIATION, STRIKE	Public Service Staff Relations Act, S.C. 1967, c.72.	Public employees (except those choosing compulsory arbitration and designated employees)
	Labour Relations Act, R.S.N.B. 1952, c.124, s.1(3a), as amended, S.N.B. 1953, c.21.	Electricity, liquor commission employees
	Conciliation & Labour Act, R.S.C. 1927, c.110, s.14.	Railways
	Industrial Relations & Disputes Investigation Act, R.S.C. 1952, c.152, s.54.	Crown Corporations (except Nat'l Research Council)
	Labour Relations Act, R.S.N. 1952, c.258, s.56.	Crown Corporations (unless excluded from L.R.A. by order of Lt.-Gov.)
RESTRICTIONS ON PICKETING	Constitution Act, R.S.B.C. 1960, c.71, s.6, as amended, S.B.C. 1959, c.17, s.6(3).	Picketing to procure strike of public employees
	Trade Unions Act, R.S.B.C. 1960, c.384, s.6(1).	Ex parte injunction "to safeguard public order"
	Judicature Act, R.S.O. 1960, c.197, s.17(3).	Ex parte injunction to restrain "a breach of the peace ... or an interruption of an essential public service...."

APPENDIX C

METHODS OF INVOKING SPECIAL LEGISLATION TO POSTPONE, PROHIBIT, OR END STRIKES

1950 - 1967

METHOD	LEGISLATION	APPLICATION
STANDING LEGISLATION RE PARTICULAR INDUSTRY	The Police Act, R.S.A. 1955, c.236, as amended, S.A. 1956, c.41.	Police
	Fire Departments Platoon Act, R.S.A. 1955, c.114.	Firemen
	Public Service Act, R.S.A. 1955, c.263, as amended, S.A. 1965, c.75.	Public employees
	Municipal Act, R.S.B.C. 1960, c.255, s.194.	Police, firemen
	B.C. Hydro & Power Authority Act, S.B.C. 1964, c.7.	Electricity (Hydro-employees)
	Public Schools Act, R.S.B.C. 1960, c.319, s.140, as amended, S.B.C. 1965, c.41.	Teachers
	Public Service Staff Relations Act, S.C. 1967, c.72.	Public employees
	Civil Service Act, R.S.N.B. 1952, c.29, s.52, as amended, S.N.B. 1964, c.17.	Public employees
	Fire Departments Arbitration Act, R.S.M. 1954, c.8, s.8, [if union constitution prohibits strike].	Firemen
	Labour Relations Act, R.S.M. 1954, c.132, s.21.	Police
	Public Schools Act, R.S.M. 1954, c.215, s.384, as amended, S.M. 1956, c.53.	Teachers
	Hospital Employees (Employment) Act, 1966-67, S.N. 1967, c.11, s.5.	Hospital employees
	Trade Union Act, R.S.N.S. 1954, c.295, s.68, as amended, S.N.S. 1965, c.53.	Power, liquor commission employees
	Hospital Labour Disputes Arbitration Act, S.O. 1965, c.48.	Hospital employees
	The Police Act, R.S.O. 1960, c.298, ss.26-35.	Police
	Fire Departments Act, R.S.O. 1960, c.145.	Firemen
	Public Service Act, R.S.O. 1960, c.331, as amended, S.O. 1962-63, c.118, S.O. 1966, c.130.	Public employees
	Trade Union Act, S.P.E.I. 1953, c.3, [repealed].	Electricity, telephone
	Industrial Relations Act, S.P.E.I. 1962, c.18, s.42.	Electricity, telephone
	Industrial Relations Act, S.P.E.I. 1962, c.18, s.44.	Police, firemen, hospital workers
	Labour Code, R.S.Q. 1964, c.141, ss.93,142,82.	Police, firemen,
	Public Service Employees Disputes Act, S.Q. 1944, c.31, s.5, [repealed].	Teachers
	City Act, R.S.S. 1965, c.147, s.104, [if union constitution prohibits strike].	Police
	Fire Departments Platoon Act, R.S.S. 1965, c.173, s.10.	Firemen
AD HOC LEGISLATION	Maintenance of Railway Operation Act, 1950, S.C. 1950-51, c.1.	Railways
	Railway Operation Continuation Act, S.C. 1960-61, c.2.	Railways
	Maintenance of Railway Operation Act, 1966, S.C. 1966, Bill C-230.	Railways
	British Columbia Coast Steamship Act, S.C. 1958, c.7.	B.C. ferry service
	St. Lawrence Ports Working Conditions Act, S.C. 1966-67, Bill C-215, [no specific prohibition of strike].	Longshoremen
	An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, S.Q. 1967, Bill 25.	Teachers
	Toronto Hydro-Employees Union Dispute Act (1965), S.O. 1965, c.131, ss.3,4.	Hydro employees

METHOD	LEGISLATION	APPLICATION
AD HOC LEGISLATION (CONT'D)	Ontario Hydro-Employees Union Dispute Act (1961-62) S.O. 1961-62, c.94.	Hydro employees
	Trade Union (Emergency Provisions) Act, S.N. 1959, c.2.	Loggers
	Maritime Transportation Unions Trustees Act, S.C. 1963, c.17.	Seamen
	Constitution Act, R.S.B.C. 1960, c.71, s.6.	Public employees
ORDER OF ADMINISTRATIVE TRIBUNAL, FOLLOWING PARTIES' FAILURE TO AGREE	Public Service Staff Relations Act, S.C. 1967 c.72, s.79.	Public employees (re designated employees)
	Civil Service Act, S.Q. 1965, c.14, s.75.	Public employees (re essential services)
ORDER IN COUNCIL	Emergency Powers Act, R.S.C. 1952, c.96.	Heat, water, electricity
	Alberta Labour Act, R.S.A. 1955, c.167, s.99.	Hospitals
	Labour Relations Act, R.S.M. 1954, c.132, s.78.	Electricity, telephone, liquor commission employees
	Civil Service Act, R.S.M. 1954, c.39, s.451, as amended, S.M. 1965, c.11.	Public employees
	Transportation Board Act, R.S.Q. 1964, c.228, as amended, S.Q. 1965, Bill 1.	Public water service
	Essential Services Emergency Act, S.S. 1966, c.2.	Heat, water, electricity, gas, hospitals
	Labour Relations Act, R.S.N. 1952, c.258, as amended, S.N. 1959, c.1, S.N. 1960, c.58, S.N. 1963, c.82 [repealed].	General (loggers)
	Labour Relations Act, R.S.N. 1952, c.258, s.39A, as amended, S.N. 1963, c.82, [repealed].	Hospital employees
MINISTERIAL ACTION	Public Schools Act, R.S.M. 1954, c.215, as amended, S.M. 1956, c.53.	Teachers
	Conciliation & Labour Act, R.S.C. 1927, c.110, s.14.	Railways
	Labour Code, R.S.Q. 1964, c.141, s.99, as amended, S.Q. 1965, c.50.	Public Employees
CONCILIATION OFFICER (FOLLOWING FAILURE OF CONCILIATION)	Public Schools Act, R.S.B.C. 1960, c.319, s.138(5), as amended, S.B.C. 1965, c.41.	Teachers

APPENDIX D

EXPERIENCE UNDER ONTARIO HOSPITAL LABOUR DISPUTES ARBITRATION ACT

APRIL 1965 - JULY 1967

1. Hospitals involved in arbitration

Hospital	number of cases
24 hospitals	24 cases
Wellesley, Toronto	2 cases
Victoria, London	2 cases
Total: 26 hospitals	28 cases

2. Union locals involved in arbitration

Local		number of cases
B.S.E.	Loc. 183	1
	Loc. 204	6
	Loc. 220	6
C.U.P.E.	5 locals	5
C.U.O.E.	Loc. 101	4
	Loc. 104	2
I.U.O.E.	Loc. 796	4
Total:	11 locals	28 cases

3. Arbitration board chairmen

Profession	Individuals	Cases
Judges and other judicial officers	8	17
Academics 2	2	4
Miscellaneous professional arbitrators	5	7
Total: 15 chairmen		28 cases

4. Unanimity of awards

Unanimous	13
Split	15
Total:	28

5. Awards in relation to length of bargaining history

First agreement	6
Second or subsequent agreement	20
Unknown	2
Total:	28

6. Use of negotiation by arbitrator

Negotiation (overtly)	4
Adjudication	24
Total:	28

APPENDIX E

EMERGENCY DISPUTES UNDER THE TAFT-HARTLEY ACT, 1947—APRIL 1, 1963

ADMINISTRATION	YEAR	INDUSTRY, COMPANY, and UNION	RESULTS
Truman	1948	1. Atomic energy, Oak Ridge, Tennessee (Union Carbide Company versus Atomic Trades and Labor Council, a local federation of AFL unions)	Agreement reached after Act had run its course and "last" offer rejected, on basis of an offer superior to "last" offer. No strike before or after Act was invoked.
	1948	2. Meatpacking (Swift, Armour, Cudahy, Morrell, and Wilson companies and United Packinghouse Workers)	Strike ended by agreement after board of inquiry made its report, but before injunction was issued.
	1948	3. Bituminous coal industry (most of industry and United Mine Workers)	Strike settlement by appointment of Senator Bridges of New Hampshire as neutral member of pension board. Meanwhile, John L. Lewis and United Mine Workers disobeyed court injunction and were heavily fined by district judge for contempt of court.
	1948	4. Telephone (American Telephone and Telegraph Company versus American Union of Telephone Workers now Communication Workers of America)	Dispute settled without a strike after board of inquiry was appointed, but before hearings were held.
	1948	5. Maritime and longshore industry (all unionized shipping companies, plus Pacific stevedoring industry, and all shipping unions plus International Longshoremen's and Warehousemen's Union)	Shipping dispute settled after injunction but prior to last-offer vote except on West Coast. International Longshoremen's and Warehousemen's Union ordered a boycott of vote, and no longshoremen voted. Then a ten-week strike occurred before settlement was reached on the West Coast.
	1948	6. Bituminous coal (industry and United Mine Workers)	Agreement reached by parties prior to strike and prior to report of a board of inquiry.
	1948	7. Longshore industry (East and Gulf Coast stevedoring firms and International Longshoremen's Association)	Act invoked and injunction issued before strike. Last-offer vote held and rejected. Agreement negotiated but rejected by membership. After two-week strike, improved agreement accepted by membership.
	1949-50	8. Bituminous coal industry (most of industry and United Mine Workers)	Sporadic strikes over four-month period led to board of inquiry appointment. When injunction failed to end strike, government moved for contempt, but court ruled government had failed to produce evidence of contempt. At this point, parties negotiated a new agreement as President Truman was asking Congress for authority to seize mines.

ADMINISTRATION	YEAR	INDUSTRY, COMPANY, and UNION	RESULTS
Truman (cont'd)	1951	9. Copper and nonferrous metals industry (Phelps-Dodge, Kennicott, Anaconda, American Smelting and Refining, and smaller companies, and Mine, Mill and Smelter Workers' Union)	After a strike, union declined offer to call it off and submit it to National Wage Stabilization Board, then a board of inquiry was appointed and an injunction issued, ending strike. All major firms settled with the union during the 80-day period, but eight smaller companies did not. Employees in these companies rejected last offer. Record does not indicate terms of settlement in these companies.
	1952	10. Atomic energy (American Locomotive Company, Dunkirk, New York, plant and United Steelworkers)	Strike halted after initial board of inquiry report and injunction. Agreement reached prior to end of 80-day period.
Eisenhower	1953-54	11. Longshore industry (East and Gulf Coast stevedoring companies and two factions of International Longshoremen's Association)	Dispute essentially involved attempt of AFL to replace racket-ridden International Longshoremen's Association, which it disaffiliated with a new affiliate in port of New York. After two representative elections, several strikes, contempt proceedings, and fines, old ILA group won out by narrow margin, won a contract, and eventual AFL reaffiliation.
	1954	12. Atomic energy (Union Carbide Company, Oak Ridge, Tennessee, and United Gas, Coke and Chemical Workers)	Short strike was followed by board of inquiry report and injunction. "Last" offer rejected, but as in 1948, better offer than "last" one resulted in agreement without strike.
	1954	13. Atomic energy, Oak Ridge, Tennessee (Union Carbide Company and Atomic Trades and Labor Council, a local federation of AFL unions)	Board of inquiry, same as No. 12, reported no threat of stoppage. Issues settled on basis of agreement reached in No. 12.
	1956-57	14. Longshore industry (East and Gulf Coast stevedoring companies and International Longshoremen's Association)	Strike over economic issues and union demand for industry-wide agreement resulted in board of inquiry, 80-day injunction, considerable litigation, rejection of employers' "last" offer, and another strike of one week in New York and longer in other ports until agreement was reached.
	1957	15. Atomic energy, Portsmouth, Ohio (Goodyear Rubber Company and Oil, Chemical and Atomic Workers)	After short strike, board of inquiry was followed by 80-day injunction and rejection of employers' "last" offer. The day after the injunction was dissolved, the parties reached agreement on a better offer than the "last" one.
	1959	16. Longshore industry (East and Gulf Coast stevedoring employees and International Longshoremen's Association)	Strike was followed by board of inquiry, 80-day injunction, and rejection of last offer. Agreement was then reached on new contract.

ADMINISTRATION	YEAR	INDUSTRY, COMPANY, and UNION	RESULTS
Eisenhower (cont'd)	1959-60	17. Basic steel industry (major steel producers and United Steelworkers)	Strike began in July. In October, board of inquiry set up, and injunction granted after Arthur Goldberg, then union counsel, contested view that health and safety were involved. Before injunction expired, agreement was reached through pressure and mediation by Vice President Nixon and Secretary of Labor Mitchell. Four small companies did not agree, and their employees rejected "last" offer. A few strikes occurred before eventual settlement.
Kennedy	1961	18. Maritime industry (East and Gulf Coast shipowners, plus a few Pacific Coast ones, and National Maritime Union and other unions)	Strike resulted in board of inquiry and 80-day injunction. Settlement was reached during 80-day period in all disputes, except that of one company, whose employees rejected "last" offer.
	1962	19. Maritime industry (Pacific Coast shipowners and Seafarers' International Union and other unions)	Board of inquiry followed by injunction ended strike. Settlement was reached for new contract during 80-day period.
	1962	20. Aerospace industry (Republic Aviation, Farmingdale, New York, and International Association of Machinists)	Board of inquiry and injunction ended strike. Settlement was reached for a new contract during 80-day period.
	1962	21. Longshore industry (East and Gulf Coast stevedoring employees and International Longshoremen's Association)	Despite "preventive mediation" by federal mediators, strike occurred when contract expired without any change of position by parties on issues involving automation and work crews. After board of inquiry 80-day injunction, and last-offer vote rejection, strike began again two days before Christmas. After a strike of about one month, President Kennedy appointed an extralegal board headed by Senator Wayne Morse which in effect imposed a settlement too generous for the union to reject and which was reluctantly accepted by the employers.
	1962	22. Aerospace industry (Lockheed Aircraft Company, California, and International Association of Machinists)	After Lockheed refused to permit a vote on union shop, as recommended by an extralegal Presidential board, union struck, and President invoked the Act. Union accepted Lockheed's offer of contract without union shop prior to last offer vote because of indications that employees would vote favorably on company offer.
	1963	23. Aerospace industry (Boeing Aircraft Company, Seattle, Washington and elsewhere, and International Association of Machinists)	After Boeing refused to accept a union shop recommendation of an extralegal board appointed by President Kennedy, the President invoked the Act to prevent a strike. Dispute settled eventually without union shop after last offer vote rejected.

SOURCE: Northrup & Bloom, Government and Labor, (1963), p. 358.

APPENDIX F

FACT-FINDING AND INVESTIGATION BY STATES

STATE	SUMMARY OF STATUTE	CHARACTER OF INTERVENTION	COMMENT
Alabama	Governor may appoint a tripartite board of mediation.	Fact-finding to gather facts and make report and recommendation.	Inactive
Arkansas	Commissioner of Labor may conduct investigations and hearings, publish reports, advertisements, etc.	Investigation and report.	Inactive
California	Department of Industrial Relations may investigate and mediate labor disputes.	Investigation	California relies almost exclusively upon mediation. Investigation is used only to develop nature and possible effect of dispute prior to intervention.
Colorado	Industrial Commissioner may conduct investigations and hearings, publish reports and advertisements, etc.	Original compulsory investigation law passed in 1915, provided for notices, cooling-off period, and compulsory investigation and report.	The investigation functions have been infrequently utilized and more recently have rarely been invoked.
Georgia	Commissioner of Labor may conduct investigations and hearings, publish reports and advertisements.	Investigation and report.	Inactive
Hawaii	Where Governor finds mediation has failed, he may appoint an emergency board to investigate and report on controversy.	Fact-finding, with recommendations.	Active (special fact-finding provision for public utilities was ruled inoperative by the United States Attorney General while Hawaii was a territory).
Illinois	Department of Labor may investigate dispute and make findings and recommendations public if public utility, food, fuel or other inconvenience to public is involved.	Investigation and fact-finding of emergency disputes.	Inactive. State Mediation Service advised writer it had no knowledge of law.
Indiana	Commissioner of Labor may investigate disputes, publish reports, and do other necessary things.	Investigation and report.	Inactive (note: Indiana also has a compulsory arbitration law which is inactive and inapplicable to utilities in interstate commerce, Marshall v. Shricker, 20 CCH Labor Cases, 66, 372, 1951).

STATE	SUMMARY OF STATUTE	CHARACTER OF INTERVENTION	COMMENT
Iowa	Either party to a dispute or persons affected may apply to the Governor for appointment of a board of conciliation and arbitration.	Fact-finding. Board of Conciliation and Arbitration's report is not binding unless parties so agree beforehand.	Inactive
Kentucky	Commissioner of Industrial Relations may hold hearings to determine the reason for the labor dispute and make public findings of fact.	Investigation and report.	Inactive
Louisiana	A tripartite Labor mediation board may mediate unsettled dispute, and render unenforceable decision and make it public if mediation fails.	Fact-finding with recommendations.	Relatively inactive
Maine	Board of inquiry may be set up if mediation is declined and is one of parties or interested persons affected request. Report can be made public.	Fact-finding and report.	Inactive
Maryland	Commission of Labor may investigate dispute, determine which party is mainly blameworthy or responsible, and publish report in some daily newspaper assigning responsibility or blame.	Investigation and assignment of responsibility.	Inactive (note: Maryland also has a seizure law affecting utilities which has been invoked only once).
Massachusetts	Tripartite Board of Conciliation and Arbitration, where no settlement is agreeable and parties will not arbitrate, shall investigate dispute and publish a report.	Investigation and assignment of responsibility.	Active until found inapplicable to interstate commerce in General Electric v. Callahan, 294 F. 2d 60 (1962) (note: Massachusetts also has a "choice of procedures" law affecting utilities).
Michigan	Fact-finding by board composed of three disinterested persons and two nonvoting members, one from labor and one from industry. Findings not binding, but made public. Law applies to public utilities, hospitals, and government employees.	Fact-finding with recommendations.	Law extensively used for hospital and government employees. Found inapplicable to utilities in interstate commerce in Grand Rapids City Coach Lines v. Howlett, 137 F. Supp. 667 (1955).
Minnesota	Fact-finding by three-man, tripartite com mission where public interest, life, safety, or health involved.	Fact-finding with recommendations.	Most active of state fact-finding agencies (note: Minnesota also has a compulsory arbitration statute applicable to hospitals only).

STATE	SUMMARY OF STATUTE	CHARACTER OF INTERVENTION	COMMENT
Missouri	Tripartite fact-finding panels may be appointed by parties and State Mediation Board.	Fact-finding with recommendations but if parties refuse to accept recommendations and strike threatens public interest, health, and welfare, Governor may seize utility—and then strikes are forbidden.	Active. Seizure aspects found inapplicable to utilities in interstate commerce in Division 1287 Amalgamated Association v. State of Missouri, 374 U. S. 74 (1963).
New Hampshire	If parties refuse to arbitrate, Commissioner may investigate and issue a report assigning responsibility.	Investigation with assignment of responsibility.	Fairly active, but future in doubt as a result of Massachusetts case.
New York	If Board of Mediation certified that it cannot settle a dispute by mediation, Industrial Commissioner may appoint a board of inquiry to make report and recommendations.	Fact-finding with recommendations.	Active
North Dakota	Head of Labor Division of state may request Governor to appoint a mediation board which may issue report and recommendations.	Fact-finding with recommendations	Active. Applies to both private and public employees.
Ohio	Industrial Commission may investigate dispute, ascertain which party is responsible, and make that fact public. At request of one or both parties, it may make recommendations for settlement, and if not accepted, publish same.	Investigation, with assignment of responsibility; fact-finding with recommendations.	Relatively inactive.
Oklahoma	Where a strike or lockout exists which causes injury or inconvenience to the public, the Board of Arbitration and Conciliation may investigate and publish findings and recommendations which will contribute to an equitable settlement.	Fact-finding with recommendations	Inactive. Tenth court of Appeals ruled fact findings inapplicable to disputes in interstate commerce, May 28, 1964, Oil, Chemical & Atomic Workers v. Arkansas-Louisiana Gas Co., 320 F(2d) 62 (1964).
Oregon	Facilities of Labor Conciliator available to public employees and government agencies for "fact-finding purposes only".	Mediation and fact-finding.	Public employees and licensed nurses in health care institutions only.
Rhode Island	Director of Department of Labor, with approval of Governor, may appoint Boards of Conciliation and Mediation to investigate and report on disputes.	Fact-finding with recommendations.	Law invoked only twice in forty years, and in neither case was a board actually appointed.

STATE	SUMMARY OF STATUTE	CHARACTER OF INTERVENTION	COMMENT
South Carolina	Commissioner of Labor may appoint tripartite committee with himself as chairman to make findings of fact designed to induce agreement.	Fact-finding with recommendations.	Inactive
South Dakota	Deputy Commissioner of Labor may investigate a dispute, make a report of the issues involved, and make recommendations public. He may do this alone or as chairman of a tripartite panel.	Fact-finding with recommendations.	Inactive
Texas	Governor may appoint a five-man tripartite commission to investigate dispute and make report and public recommendations.	Fact-finding with recommendations.	Relatively inactive.
Washington	If the parties to a dispute refuse to arbitrate, Director of Labor and Industries endeavors to have each put in writing his position and why he refused to arbitrate.	Investigation by indirection.	Relatively inactive.

SOURCE: Northrup & Bloom, Government and Labor, (1963), p. 382.

APPENDIX G

LES CONFLITS DU TRAVAIL DANS LES INDUSTRIES ESSENTIELLES

RESUME

CHAPITRE I

LA NOTION "D'INDUSTRIES ESSENTIELLES"

Il faut d'abord définir la portée du problème à l'étude. Toutefois, il est impossible de donner un seul sens bien précis au mot "essentielles". Voici plutôt trois définitions corrélatives.

A. Définition par le précédent

L'adoption de mesures législatives ou administratives extraordinaires dans le but de retarder ou de régler un conflit du travail est la preuve que ce conflit porte atteinte à un droit commun "essentiel". On a eu recours à ces modes d'intervention extraordinaire dans plusieurs secteurs d'activité: transport, services d'utilité publique, hôpitaux, services du gouvernement, d'éducation et de sécurité publique.

B. Définition conceptuelle

Une industrie pourrait être qualifiée d'essentielle si l'on juge qu'elle touche de très près l'intérêt public. Toutefois, cette façon d'aborder la question n'est pas particulièrement profitable, puisqu'il faut bien admettre

que toutes les industries touchent plus ou moins l'intérêt public. Celles qu'on dit "essentielles" se classent simplement à une extrémité de l'éventail des activités "d'intérêt public". Mais, cet exercice n'est pas très précis.

C. Définition phénoménologique

Une industrie "essentielle" en est une dans laquelle un arrêt du travail peut toucher un grand nombre de non-participants, mettre en danger la sécurité ou la défense nationale, la santé, la personne ou la propriété, ou même, pourrait-on soutenir, le bien commun. Il s'agit encore d'une industrie où le règlement d'un conflit imposera directement ou indirectement certains frais à la communauté ou qui peut soulever suffisamment l'opinion publique pour créer des pressions en vue d'aboutir à un règlement.

CHAPITRE II

LA PORTEE DU PROBLEME

Tout en admettant que l'impossibilité de définir clairement ce qu'on entend par "essentiel" rend difficile l'évaluation du phénomène, même après avoir donné de ce terme toutes les définitions possibles, il est évident que le problème posé au Canada par les conflits dans les industries essentielles est peu important mais grandissant. Qu'il s'agisse du nombre total de grèves ou du nombre d'heure-hommes perdues, ou de la proportion que ces grèves dans les industries essentielles représentent face aux pertes totales pour l'ensemble de l'économie, les conflits dans les industries essentielles sont de plus en plus fréquents depuis le début des années '60. C'est dans l'industrie du transport qu'a été occasionnée la grande partie des pertes

imputables aux grèves dans les industries essentielles; d'autre part, le nombre de conflits et les pertes de temps causées par les grèves augmentent dans les services du gouvernement, d'éducation et de santé.

Aux Etats-Unis, de préférence à l'expression "conflits dans les industries essentielles", l'expression courante est celle employée dans la loi: "conflits donnant lieu à des situations d'urgence ". Quoique d'une portée moins grande, ces conflits sont peu nombreux et, dans plusieurs cas, tout au moins, c'est à tort qu'on les a ainsi qualifiés puisqu'ils ne mettaient pas l'intérêt national en danger.

Un examen sélectif des conflits survenus dans les industries essentielles d'autres pays établit simplement qu'ils se sont en fait produits.

Il en ressort, et particulièrement de l'étude de l'expérience des Etats-Unis, que relativement peu de grèves portent vraiment atteinte à l'intérêt national ou à la santé et à la sécurité des individus et que les spectres de la mort et du désastre si souvent évoqués par les commentateurs partisans se matérialisent peu souvent pour ne pas dire jamais.

CHAPITRE III

LA LEGISLATION CANADIENNE CONCERNANT LES CONFLITS DANS LES INDUSTRIES ESSENTIELLES

Etant donné l'orientation des décisions judiciaires concernant le pouvoir de légiférer en matière de relations du travail, il est évident que le seul impact d'une grève sur l'intérêt national n'entraîne pas par le fait même des mesures législatives de portée nationale. En effet, la plupart des grandes industries manufacturières relèvent de la compétence des provinces,

comme c'est le cas pour la plupart des services d'utilité publique, des services de transport locaux, des services de santé et, il va sans dire, des fonctions publiques provinciales et municipales. D'autre part, une très forte proportion des industries qui relèvent de la compétence fédérale pourraient être qualifiées "d'essentielles", principalement celles des transports ou des communications, de la fonction publique fédérale, ou les industries rattachées à la défense nationale.

On pourrait croire que le caractère public d'un nombre assez important d'entreprises canadiennes (une ligne aérienne, une compagnie de chemin de fer, un réseau de télévision, plusieurs services régionaux d'utilité publique, etc.) porterait le public à s'inquiéter davantage des conflits du travail qui se produisent dans ces industries; mais on peut, en fait, soutenir que c'est le contraire qui se produit. La tendance est plutôt à la "normalisation" des relations du travail dans le secteur public sans les distinguer des conflits du secteur privé. Toutefois, dans les deux secteurs, l'impact sur le public reste une question difficile.

En traçant l'évolution de la politique législative du Canada, de 1877 à 1939, on constate que les industries essentielles ont fait l'objet de mesures législatives spéciales. La loi fédérale de 1907, Loi des enquêtes en matière de différends industriels, qui s'appliquait aux "mines de charbons, aux chemins de fer et aux services d'utilité publique" est d'importance particulière. En effet, ce sont ces industries qui ont par la suite fait l'objet de plusieurs mesures législatives fédérales et provinciales jusqu'à l'adoption, dans les années '40, de la législation actuelle sur la négociation collective. Cette tendance a marqué la philosophie à la base de la législation canadienne, principalement pour ce qui est de la conciliation

obligatoire, parce qu'elle démontre que l'on a cette fausse idée qu'il faudrait considérer tous les conflits comme s'ils touchaient tous, d'égale façon, l'intérêt public.

Au cours de la guerre et des années qui l'ont suivie, la philosophie de base de la législation canadienne a pris, dans une large mesure, la même orientation que celle des Etats-Unis, en particulier pour ce qui est d'encourager la négociation collective libre, l'Etat faisant fonction de conciliateur ou de médiateur impartial. Paradoxalement, alors qu'aux Etats-Unis la guerre entraînait une législation restrictive et rendait inutile la négociation collective, le contraire se produisait au Canada. Les droits fondamentaux d'association et de négociation collective s'affirmaient alors que le fédéral, en raison des pouvoirs qui lui étaient accordés en temps de guerre, avait la compétence en matière de relations du travail.

Depuis 1948, et surtout au cours des années '60, on a favorisé de plus en plus le recours à des mesures législatives spéciales ou à des mesures administratives pour régler ce qu'on appelle les conflits dans les industries essentielles.

Une analyse des lois adoptées à l'époque, pour ce qui est des industries touchées, des organismes chargés de régler les conflits et des moyens de recours à ces organismes, ne révèle aucune façon particulière d'aborder le problème au Canada. Jusqu'à ces dernières années, on cherchait à éviter ces lois imprécises qui comportent la possibilité pour le gouvernement d'intervenir, d'une manière non spécifiée, dans les conflits du travail qui se produisent dans des industries dont la nature n'est pas définie d'avance. Toutefois, la Colombie-Britannique et la Saskatchewan ont toutes deux adopté récemment des lois de ce genre qui n'existaient auparavant qu'au Manitoba.

D'autre part, le Québec où depuis des années le recours à la grève était expressément interdit dans les industries essentielles prenait une position moins restrictive après 1960. En conséquence, il s'est vu aux prises avec une série de grèves difficiles et fâcheuses, déclenchées par les personnes mêmes qui n'avaient pas auparavant le droit de grève. Au niveau fédéral, la tendance a été de recourir à des mesures spéciales, c'est-à-dire à des commissions d'enquête sur les relations industrielles et à des commissions royales, à des lois destinées à mettre un terme aux grèves ou à imposer aux parties en cause les modalités d'un règlement précisées dans la loi même ou par un arbitre.

En raison de la préoccupation du public au sujet de l'arbitrage obligatoire comme moyen de régler les conflits dans les industries essentielles, une étude a été faite de la loi ontarienne sur l'arbitrage des conflits du travail dans les hôpitaux (Ontario Hospital Labour Disputes Arbitration Act). Depuis son entrée en vigueur en 1965, cette loi a permis de mettre à l'épreuve la thèse que soutiennent plusieurs experts en relations du travail et selon laquelle la possibilité d'un recours à l'arbitrage a un effet corrosif sur la négociation collective. Alors que les premières expériences vécues après l'adoption de cette loi semblaient réfuter cette hypothèse, le nombre des impasses dans les négociations a augmenté et, de plus en plus, on a eu recours à l'arbitrage. Si le nombre de cas soumis à l'arbitrage dans les premières années qui ont suivi l'entrée en vigueur de cette loi est peu élevé, le fait est attribuable à ce que plusieurs syndicalistes s'opposaient en principe à l'arbitrage obligatoire, étant convaincus que c'était un moyen moins efficace pour obtenir de bons salaires et de bonnes conditions de travail que la négociation sous la menace d'une grève. Probablement parce que plusieurs décisions arbitrales ont démontré la fausseté de cette assertion,

et que le processus d'arbitrage ne faisait plus peur aux syndicats, ces derniers sont de plus en plus disposés à recourir à cette méthode.

La loi ontarienne sur l'arbitrage des conflits dans les services hospitaliers fait aussi ressortir le problème particulier que présentent les industries essentielles financées par le public, ou qui offrent au public un service dont le prix est fixé par un organisme public. Le règlement d'un conflit salarial dans ces industries peut, en raison des pressions exercées par les syndicats, obliger la partie patronale à affecter aux salaires des fonds destinés aux avantages sociaux et qu'il conviendrait peut-être de dépenser autrement. Par conséquent, l'organisme public de financement d'une telle industrie a tendance a vouloir dicter les progrès de la négociation collective, ou le taux d'augmentation consenti. Toutefois, tant qu'il n'y aura pas de participation directe de ces organismes publics à la table des négociations, il est peu probable qu'ils réussissent à régler les choses comme ils veulent. De fait, patrons et syndicats, dans une industrie essentielle, pourraient se sentir obligés de permettre que leur conflit atteigne le stade de la grève afin de pouvoir obtenir les fonds publics nécessaires, ou celui de l'arbitrage en laissant à l'arbitre le soin de s'acquitter de cette tâche pour eux.

L'étude a également permis de déceler certaines difficultés inhérentes à l'arbitrage, soit le défaut de données sûres, l'absence de critères précis pour guider les arbitres et, ce qui importe le plus, la tendance qu'on a d'imposer à un organisme chargé de rendre des décisions le règlement de conflits de plus en plus nombreux et qui comportent un nombre croissant de problèmes plutôt que de régler ces conflits par la négociation directe.

La loi de la commission de médiation de la Colombie-Britannique (British Columbia Mediation Commission Act), une autre expérience canadienne d'importance, a été adoptée lorsque la présente étude était pratiquement terminée. Néanmoins, une analyse des dispositions de cette loi justifie la prédiction suivante: elle n'aura pas plus de succès que les lois existantes pour régler à l'amiable les conflits dans les industries essentielles. En effet, c'est une loi qui tient trop du formalisme et de l'intransigeance, ce qui constitue l'une de ses plus grandes faiblesses, c'est-à-dire que, par ce fait même, elle pourrait nuire sérieusement au travail de la commission de médiation chargée de maintenir la paix sociale.

CHAPITRE IV

L'EXPERIENCE LEGISLATIVE DES ETATS-UNIS

Directement à l'inverse de la situation qui existe au Canada, l'évolution constitutionnelle des Etats-Unis, tend à accorder au gouvernement fédéral le pouvoir presque exclusif de régler les conflits du travail d'importance. Les seules exceptions à cette règle touchent les fonctionnaires des Etats et des municipalités, les travailleurs des institutions à but non lucratif (par exemple, les hôpitaux) dont les activités sont limitées à un Etat. Si la première loi fédérale d'importance concernant les industries essentielles, le Railway Labor Act de 1926, a été très efficace dans les années qui ont immédiatement suivi son entrée en vigueur, elle est maintenant en défaveur auprès du public. Un nombre croissant de conflits sont soumis à des commissions spéciales dont les décisions ne lient pas les parties, ce qui entraîne délais et frustrations. En effet, l'expérience acquise sous le régime du Railway Labor Act démontre que pratiquement n'importe quel régime, si efficace

qu'il soit au début, deviendra tôt ou tard un lieu commun et cela en diminuera sensiblement la force.

La loi Taft-Hartley adoptée en 1947 établit la procédure à suivre pour retarder, mais non pour interdire, les arrêts de travail dans les industries essentielles. Cette loi à laquelle on a recours peu souvent, et peut-être par le fait même sans grand succès, a néanmoins fait l'objet de critiques sévères. Plus précisément, voici les points mis en doute: la difficulté de la définition, la tendance à faire naître des pressions politiques pour forcer le président à intervenir, l'inflexibilité de l'organisme de recherches, l'absence d'organisme efficace de médiation durant la période au cours de laquelle la grève est interdite et le dernier tour de scrutin dont le résultat est facilement prévisible.

Dans certaines industries-clés, surtout celles qui sont reliées aux programmes de défense et d'exploration de l'espace, les parties en présence ont établi des procédures permanentes non statutaires sous la surveillance du gouvernement. Bien que ces procédures visent à maintenir la paix sociale et à éviter des interruptions désastreuses, les faits laissent encore croire, que, par leur caractère permanent et leur accès facile, elles ont eu un mauvais effet sur la négociation.

D'autre part, les autorités fédérales des Etats-Unis ont pris à l'occasion des mesures législatives et administratives spéciales qui se sont révélées efficaces.

Au début des années '50, par suite de nouvelles interprétations de la constitution, un certain nombre de lois d'Etat sur les conflits dans les industries essentielles ont été jugées anticonstitutionnelles, et divers

régimes établis sous l'empire de ces lois ont cessé de fonctionner. Toutefois, durant la période où ces mesures législatives étaient en vigueur, et dans la mesure où elles le sont encore, elles sont sources d'intérêt.

La plus importante de toutes est la loi Slichter du Massachusetts sur le "choix des procédures à suivre". Elle a pour caractéristique intéressante, comme plusieurs commentateurs l'ont déjà noté, qu'elle offre au gouvernement le choix de diverses mesures qu'il peut appliquer, que ce soit l'une de préférence à l'autre ou l'une après l'autre, et qu'il peut adapter selon le degré d'urgence de la situation à laquelle il doit faire face. L'existence même d'un certain nombre de moyens à envisager pour régler un conflit empêche les parties en cause d'établir leur tactique sur la certitude que le gouvernement aura recours à telle mesure en particulier.

Un certain nombre d'autres lois adoptées par les Etats prévoyaient l'arbitrage obligatoire ou la saisie d'industries essentielles aux prises avec une grève ou menacées par un arrêt de travail; ces lois, comme nous l'avons dit plus haut, ont été révoquées ou ont perdu de leur efficacité. Le peu d'expérience acquise à l'application de ces lois ne permet pas de tirer des conclusions générales; toutefois, la plupart des commentateurs semblent d'accord pour affirmer que leur efficacité dépend de deux choses: le recours à ces mesures de façon restreinte et le consentement des deux parties à suspendre leur conflit pour obéir aux prescriptions de la loi. La moindre des exigences de certaines lois, celle d'un vote de grève ne semble pas faire plus de mal que de bien. Cependant, comme on pouvait s'y attendre, les commissions d'enquête ou les organismes de médiation ont aidé à régler certains conflits qui troublaient la paix sociale.

Dans les écrits sur la situation qui existe aux Etats-Unis, il est question de deux dispositifs rattachés l'un à l'autre et qui n'ont jusqu'ici fait l'objet d'aucun texte de la loi. La "grève statutaire" est un dispositif qui force la direction et les employés à céder une partie ou la totalité des profits pécuniaires qu'ils tirent de l'exploitation ininterrompue de leur entreprise, tout en les obligeant à demeurer au travail ou à maintenir leurs services ou leur production, selon le cas. Les pressions ainsi exercées pour mettre fin à une situation désagréable qui ne présente aucun avantage pécuniaire peuvent amener les parties à régler leur conflit sans priver le public de biens ou de services. De la même façon, ce qu'on est convenu d'appeler "l'injonction partielle" assure au moins à la communauté le fonctionnement ininterrompu de l'un des secteurs d'un service essentiel, tout en permettant aux parties en présence de s'affronter quant au reste.

Enfin, l'arbitrage "tout ou rien" est une idée nouvelle qui forcerait les parties à modifier leurs positions et à chercher un compromis plutôt que de se soumettre à une décision obligatoire qui accorderait une victoire complète à la plus raisonnable des parties tandis qu'elle ferait subir à l'autre une défaite complète.

CHAPITRE V

L'EXPERIENCE LEGISLATIVE DES PAYS SITUES AU-DELA DU CONTINENT NORD-AMERICAIN RELATIVEMENT AUX CONFLITS DANS LES INDUSTRIES ESSENTIELLES

De sérieux obstacles d'ordre pratique se présentent lorsqu'on cherche à transplanter d'un pays dans un autre les institutions chargées des relations du travail. Il existe en effet, sur les plans social, économique et politique, des différences qui rendent suspecte toute proposition en ce sens.

Toutefois, deux thèmes semblent surgir de l'expérience qu'ont connue les pays situés au-delà du continent nord-américain. Tout d'abord, il est possible et souhaitable de charger dans une grande mesure les parties en cause d'entretenir de bonnes relations du travail, particulièrement en les intéressant à créer des institutions privées ou gouvernementales qui leur serviraient d'intermédiaire pour régler leurs conflits. En deuxième lieu, il faut trouver des solutions très appropriées aux problèmes que posent les conflits dans les industries essentielles. Lorsqu'il s'agit d'établir les règles appropriées à chaque industrie, ce sont encore les parties elles-mêmes qui sont en mesure d'y contribuer le plus.

CHAPITRE VI

OBJECTIFS GENERAUX DANS LES RELATIONS DU TRAVAIL DES INDUSTRIES ESSENTIELLES

Pour évaluer toute proposition concernant le règlement des différends du travail dans les industries essentielles, il faut viser certains objectifs généraux.

Tout d'abord, dans notre économie mixte, patrons et syndicats jouissent de la liberté d'action économique. Cependant, la liberté d'entreprise a été entravée dans plusieurs industries essentielles par la nationalisation ou la régie publique. On peut donc soutenir que la liberté d'action économique au niveau des relations du travail devrait également le céder à toute intervention de l'Etat. Toutefois, pour des raisons de convenance plutôt que par principe, plusieurs motifs peuvent être invoqués à l'appui du maintien de la liberté d'action économique. La grève est si onéreuse pour les deux parties en cause, qu'elles chercheront presque toujours à s'entendre

plutôt que d'entrer en lutte. D'autre part, les risques que comporte un régime d'arbitrage obligatoire sont grands à cause des difficultés que rencontrent les arbitres lorsqu'il s'agit d'établir des normes et de les appliquer. De plus, rien ne garantit, de fait, qu'il n'y aura pas de grèves uniquement parce que les conflits sont interdits et que les parties doivent recourir à l'arbitrage.

Un deuxième objectif, qui a son importance, est celui de la paix industrielle. En règle générale, dans les relations du travail, la liberté d'action économique a priorité sur la paix industrielle mais, pour ce qui est des conflits dans les industries essentielles, la plupart des personnes renverseraient maintenant cet ordre de priorité et préserveraient la paix, même si une telle décision exigeait des parties en cause qu'elles sacrifient leur liberté d'action. C'est particulièrement le cas, comme on pourra le constater ci-après, lorsqu'un conflit cause un certain tort au pays ou à ses citoyens.

Troisièmement, il y a un désir primordial de protéger la vie, la santé et le bien-être des citoyens et d'assurer la sécurité nationale. Personne ne conteste la primauté de cet objectif, mais il se produit des conflits lorsqu'on se demande si, dans telles circonstances, l'intérêt public et national est vraiment mis en danger et si le risque est si grand qu'il ne peut être toléré. Evidemment, le peu d'observations qui ont été faites ne sauraient prouver que le patronat ou les travailleurs sont enclins à prendre à la légère ces intérêts d'importance vitale, ou bien que certains particuliers ou la société ont de fait subi des inconvénients graves.

Quatrièmement, un autre objectif qu'il importe de viser lorsqu'on cherche à régler les conflits du travail dans les industries essentielles est

de sauvegarder la vie en société. Certains avantages non économiques dont jouit la société, tels le fonctionnement du gouvernement, les écoles, les communications et le transport urbains et interurbains, les journaux et divers autres services qui engagent le prestige national, présentent les plus grandes difficultés lorsqu'il s'agit d'établir l'équilibre entre la liberté d'action économique et les intérêts de la société. C'est là que l'on risque particulièrement de commettre une erreur de calcul, car un conflit du travail pourrait outrager ou mettre en colère bien des gens dont les intérêts ne s'en trouvent aucunement lésés. Pourtant, leur réaction collective aura sans aucun doute un grand effet sur les autorités politiques qui ont le pouvoir d'intervenir.

Cinquièmement, à cette question de la sauvegarde de la vie en société se rattache celle d'un grand nombre de non-participants soucieux d'éviter les pertes qu'occasionnent pour l'économie les grèves qui se produisent dans certaines industries essentielles, par exemple, dans les transports et les communications. Ces pertes varient par le degré d'importance, mais non par leur nature, des pertes que subissent les fournisseurs et les clients dans un conflit du travail ordinaire. Là encore, les pertes occasionnées pour un grand secteur de l'économie amèneront certes le public à réclamer à cor et à cri que le gouvernement intervienne.

Enfin, l'un des objectifs les plus importants est celui de la répartition rationnelle des ressources publiques. Il est important d'éviter une situation où les priorités sociales sont déterminées par les pressions de la négociation collective, tout en évitant, de traiter injustement ceux qui accomplissent un travail d'intérêt public dans des industries essentielles, au nom d'un budget équilibré ou d'un programme d'austérité du gouvernement.

CHAPITRE VII

ETABLISSEMENT DE TECHNIQUES POUR LE REGLEMENT DE CONFLITS DANS LES INDUSTRIES ESSENTIELLES

Si l'on tient compte des divers objectifs généraux énoncés plus haut, il est possible d'établir et d'évaluer le caractère pratique ou peu pratique des solutions existantes ou proposées pour le règlement des conflits du travail dans les industries essentielles.

La solution devrait-elle être uniforme pour tous ces conflits, ou devrait-on chercher des solutions multiples? En d'autres mots, est-il souhaitable ou possible d'établir un seul mode de règlement des conflits pour toutes les industries essentielles, ou devrait-on instituer des modes de règlement spéciaux pour chaque industrie? Si l'uniformité semble plus équitable et favorise l'efficacité administrative, en fait l'argument en faveur de l'uniformité fait preuve de bonne tactique: d'après l'expérience, il est établi que, dans une industrie désignée comme industrie devant faire l'objet d'un traitement spécial, les parties sont de moins en moins disposées à régler leurs différends ou capables de le faire par la voie "normale" de la négociation collective. D'autre part, les considérations qui favorisent des solutions multiples aux problèmes d'industries particulières ont, à tout prendre, plus de force. En général, les solutions devraient répondre aux problèmes et les problèmes varient grandement d'une industrie à une autre, et d'une époque à une autre. En effet, l'inquiétude que manifeste le public au sujet des conséquences d'un conflit du travail peut avoir des causes politiques ou sociales extrinsèques, qui ne reflètent en rien les circonstances particulières du conflit lui-même.

Enfin, le fait même d'avoir confié aux parties en cause dans une industrie particulière la tâche de trouver les moyens de garder la paix, et il en est d'autres mentionnés ci-dessous, peut susciter leur intérêt pour la mise en oeuvre de ces moyens, ce qui n'aurait pas été le cas autrement.

Une autre décision connexe reste à prendre: les règles qui gouverneront un différend particulier devraient-elles être établies d'avance, avant même que n'éclate le conflit, ou devraient-elles être établies précisément pour répondre au caractère particulier du différend?

On peut ici avancer de nouveau plusieurs des arguments déjà présentés en faveur d'une solution uniforme, par opposition à des solutions multiples. Il semble y avoir une certaine injustice à appliquer des mesures spéciales et, en fait, c'est ce qui pourrait se produire si l'on agissait sous le coup de l'émotion et de façon peu réfléchie dans une situation critique. Lorsqu'on a recours à une mesure spéciale, il ne faut pas oublier que le processus législatif est lent, et qu'un débat sur l'adoption de telles mesures peut engendrer, sur le plan politique, un cruel esprit de parti.

D'un autre côté, il est certain que la solution établie d'avance laisse beaucoup à désirer quant à son efficacité pour le règlement d'un conflit. Dans la mesure où les parties demeureront dans l'incertitude sur les mesures que le gouvernement pourrait prendre, elles seront peut-être pressées de régler leur différend plutôt que de courir le risque d'une intervention de caractère imprévu, qu'elles pourraient juger préjudiciable à leurs intérêts. De plus, la solution spéciale répond plus facilement aux exigences d'un cas particulier et peut résoudre, en plus du différend lui-même, les problèmes d'organisation et de milieu qui en sont la cause fondamentale. Enfin, les solutions spéciales ne laissent pas nécessairement pressentir d'autres

conflits. Les parties peuvent faire ce qu'elles veulent. A tout prendre, la solution spéciale semble donc préférable.

Si l'on considère ensuite le choix à faire entre l'obligation et le volontariat, il est évident que les meilleures solutions sont celles auxquelles les parties en cause ont adhéré volontairement plutôt que celles qui sont imposées par la loi. Il est tout au moins évident que les parties en cause connaissent mieux que quiconque de l'extérieur ce qui sert le mieux leurs intérêts communs. On croit généralement que l'efficacité générale de notre régime économique vient de la possibilité pour un certain nombre d'individus, agissant de façon raisonnable et spontanée, de prendre des décisions qui les touchent eux-mêmes ainsi que ceux avec lesquels ils traitent. Il sera très difficile de persuader les parties en cause, lorsqu'elles sont privées de cette occasion, qu'elles n'en sont pas plus mal en définitive quelle que soit la situation, objectivement parlant. De fait, dans la mythologie du patronat et des syndicats, le droit de contestation est presque considéré comme un droit civil analogue au droit de contestation politique ou sociale. Cette conviction est tellement bien ancrée que les problèmes d'application de toute disposition obligatoire paraîtront énormes. Il est presque impossible d'obliger la population à se plier à une loi lorsqu'une forte proportion de cette population est décidée à l'ignorer, surtout lorsque le gouvernement ne veut pas ou ne peut pas se contraindre à mettre en oeuvre une campagne brutale et coûteuse pour forcer la population à respecter cette loi. Ainsi nous pouvons au moins dire que "nous devrions de bon droit continuer de favoriser l'accord consensuel".

Devrions-nous mettre l'accent sur le maintien de la paix ou sur le règlement des conflits? Même si l'on peut croire qu'il s'agit d'expressions

interchangeables, la première met l'accent sur la suppression des conflits alors que la seconde met en lumière l'importance fondamentale qu'il y a de s'attaquer aux causes profondes des conflits et de les éliminer. En conséquence, le besoin d'assurer le règlement des conflits renforce la priorité accordée précédemment aux méthodes volontaires, parce que l'entente acceptée de plein gré par les parties en cause est la plus sûre indication qu'elle sera durable. Toutefois, il ne faut pas mettre en oeuvre des moyens de règlement que dans les cas de crise. Ils devraient être axés de façon permanente sur la solution des différends au fur et à mesure qu'ils se produisent; en cela, le gouvernement peut jouer un grand rôle en offrant les renseignements, l'aide financière et les services de médiation voulus.

Nous avons ensuite à choisir entre l'adaptabilité et la prévisibilité. Aussi longtemps que nous serons engagés par un régime de négociation collective pour le règlement des conflits du travail, il est évident que nous devrons favoriser l'adaptabilité de préférence à la prévisibilité dans les solutions mises de l'avant. La prévisibilité, qui fait qu'on connaît à l'avance le prochain geste du gouvernement, encourage inévitablement chacune des parties en cause à manoeuvrer de telle sorte qu'elles placeront l'autre dans une telle situation que le recours à ce geste prévu sera préjudiciable à la partie adverse. Cela nuit à la recherche de règlements acceptables aux deux parties. D'autre part, la flexibilité et l'improvisation entraînent un risque: toute institution établie dans de telles circonstances n'aura pas l'expérience voulue pour régler la situation de façon compétente.

CHAPITRE VIII

CONCLUSION ET PROPOSITION: LA LOI SUR LA PAIX INDUSTRIELLE

Il est donc proposé que soit adoptée une Loi sur la paix industrielle, compte tenu de la préférence indiquée plus haut pour le maintien de la paix industrielle grâce à des modes de règlement des conflits qui seraient de nature volontaire, flexibles, multiples et, ce qui est soutenable, particuliers à chaque cas.

En somme, cette nouvelle loi établirait une Commission canadienne sur la paix industrielle, commission qui aurait l'autorité sur certaines industries désignées soit dans la loi, soit après sa mise en vigueur, par la Commission elle-même.

Patrons et syndicats de chaque industrie "désignée" seraient tenus de participer à une conférence conjointe afin d'établir un programme de maintien de la paix dans l'industrie qui favoriserait le règlement pacifique des conflits du travail en tenant bien compte de l'intérêt public. La Commission participerait à la conférence, en assurerait la présidence et lui offrirait les services de divers experts pour l'aider dans son travail. Le programme établi par la conférence serait alors soumis à la Commission qui l'approuverait ou le modifierait ou, encore, si la conférence ne pouvait en venir à un accord, en établirait un pour cette industrie.

Les parties en cause ou la Commission pourraient employer les moyens qu'elles jugent nécessaires pour mener à bien leur programme de maintien de la paix, ou tout simplement recommander de maintenir le "statu quo", c'est-à-dire les dispositions prévues par la législation actuelle sur les relations

du travail. Toutefois, quelles que soient les dispositions adoptées en fin de compte, le programme doit répondre au critère de "l'intérêt public". Lorsqu'il s'agit d'établir si le programme satisfait à ce critère, voici les principes qui devraient inspirer la Commission:

a) le caractère souhaitable des négociations et des ententes patronales-syndicales sur les salaires et les conditions de travail;

b) la nécessité d'éviter les conflits du travail qui mettent en danger la sécurité de la communauté canadienne ou encore la santé ou la vie des citoyens qui en font partie;

c) le besoin d'atténuer les conflits du travail qui interrompent la vie sociale, politique et économique de la communauté canadienne; et

d) les normes d'efficacité et de simplicité à observer autant que possible dans l'administration du programme.

Il importe de faire valoir que les diverses solutions qu'offrirait le programme pourraient comprendre les modes de règlement suivants, sans toutefois être nécessairement restreintes à cela: l'arbitrage obligatoire et final, l'arbitrage non obligatoire, la médiation et la conciliation, la remise à plus tard des grèves et lock-out, le maintien des services essentiels ou d'urgence, des services spéciaux de négociation ou de conciliation, la grève ou le lock-out, ou tout autre moyen de favoriser la paix sociale. A ces nombreuses possibilités s'ajouteraient la restructuration des institutions de négociation, l'établissement de procédures de négociation permanente, et la recherche de nouveaux moyens de répondre aux besoins particuliers de l'industrie.

Afin de ne pas associer le travail de modification du programme avec une crise particulière dans les négociations, un service serait établi en vue de permettre la révision et la modification du programme à certaines périodes fixes sauf durant les négociations collectives. Afin d'assurer la promulgation de toute loi complémentaire utile (par exemple, celle de l'affectation des crédits nécessaires par le Parlement) la Commission aurait l'occasion d'attirer l'attention du Parlement sur la nécessité de prendre de telles mesures législatives ou de voter les crédits nécessaires.

Enfin, pour assurer que les deux parties en cause respecteraient les règles établies, le programme lui-même aurait force de loi.

NOTES